Department of
CRIMINAL JUSTICE TRAINING

KENTUCKY JUSTICE AND PUBLIC SAFETY CABINET

2008

Leadership is a behavior, not a position

CASE LAW UPDATES
SECOND QUARTER

KENTUCKY COURT OF APPEALS
KENTUCKY SUPREME COURT
SIXTH CIRCUIT COURT OF APPEALS

John W. Bizzack, Ph.D.
Commissioner

Department of Criminal Justice Training
Kentucky Justice and Public Safety Cabinet

Kentucky Leadership Institute
Leadership is a behavior, not a position

The Leadership Institute Branch of the Department of Criminal Justice Training offers a Web-based service to address questions concerning legal issues in law enforcement. Questions can now be sent via e-mail to the Legal Training Section at

docjt.legal@ky.gov

Questions concerning changes in statutes, current case laws and general legal issues concerning law enforcement agencies and/or their officers acting in official capacity will be addressed by the Legal Training Section.

Questions concerning the Kentucky Law Enforcement Council policies and KLEFPF will be forwarded to the DOCJT General Counsel for consideration.

Questions received will be answered in approximately two or three business days.

Please include in the query your name, rank, agency and a daytime phone number in case the assigned attorney needs clarification on the issues to be addressed.

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NOTE:

General Information concerning the Department of Criminal Justice Training may be found at http://docjt.ky.gov. Agency publications may be found at http://docjt.ky.gov/publications.asp.

In addition, the Department of Criminal Justice Training has a new service on its web site to assist agencies that have questions concerning various legal matters. Questions concerning changes in statutes, current case laws, and general legal issues concerning law enforcement agencies and/or their officers can now be addressed to docjt.legal@ky.gov. The Legal Training Section staff will monitor this site, and questions received will be forwarded to a staff attorney for reply. Questions concerning the Kentucky Law Enforcement Council policies and those concerning KLEFPF will be forwarded to the DOCJT General Counsel for consideration. It is the goal that questions received be answered within two to three business days (Monday-Friday). Please include in the query your name, agency, and a day phone number or email address in case the assigned attorney needs clarification on the issues to be addressed.

KENTUCKY

PENAL CODE - ASSAULT IN THE THIRD DEGREE

Israel v. Com.
2008 WL 2551403 (Ky. App. 2008)

FACTS: On Sept. 4, 2006, during a cookout, a neighbor noticed that Israel's vehicle was parked so close to a guest's vehicle that it was "actually resting above the bumper of the other vehicle." Police were called.

Officer Wright (Elsmere PD) responded to the call. He approached Israel and his wife, and "Israel became agitated." The neighbor "testified that she observed Israel push the officer and that Israel appeared to punch the officer in the face when the officer reached for his radio on his shoulder." She called 911 and returned, and saw "Israel continue to swing violently at the officer." She admitted to being scared of Israel, which was why she called police in the first place. Other guests testified consistently with the neighbor's story. A different neighbor also testified that the officer used pepper spray when charged by Israel.

Officer Wright testified that when he'd asked for the vehicle paperwork, Israel "became aggressive and struck his hand and note pad." He stated that "Israel kept moving toward him as he backed up, and that he'd used pepper spray" against Israel.

Israel was charged with, and eventually indicted, of Assault in the Third Degree. He was convicted, and appealed.

ISSUE: Is an attempted assault against a law enforcement officer sufficient to charge the suspect with Assault in the Third Degree?

HOLDING: Yes

DISCUSSION: Israel argued that the "only contact he made with the officer was with the officer's hand and note pad." He further argued that contact was accidental. Other witnesses indicated that Israel actually struck Officer Wright in the head, however, the Court noted that "even if Israel did not strike the officer in the head, there was testimony that he at least attempted to strike the officer." Israel argued that all of the witnesses had negative opinions of him, including the officer. The Court found that the credibility of witnesses was the province of the jury, and that issue of bias was put before the jury. The Court found the evidence was sufficient to support the conviction.

PENAL CODE - ESCAPE

Brown v. Com.
2008 WL 2065225 (Ky. App. 2008)

FACTS: On the day in question, an officer (Allen County) spotted Brown in the back seat of a passing car. The officer knew of an outstanding warrant for Brown and made a traffic stop. As the vehicle stopped, both of the back doors were opened and another individual ran away. (It was later learned that person also had open warrants.) Brown was told that he was under arrest. Brown got out and turned his back to the officer, so the officer placed "him in what could best be described as a bear hug." They struggled and the officer tried to handcuff Brown. As the officer dropped his cuffs and tried to retrieve them, Brown jumped upon on the roof of the car. The officer pulled him down, "but Brown landed on top of the officer who was injured in the fall." They continued to struggle, and Brown kicked the officer in the head multiple times. Finally, Brown got away from the officer. He was captured and arrested the following day. Brown was charged with Escape, as well as the original charges from the arrest warrant. He was convicted, and appealed.

ISSUE: Is is necessary for someone to have actually been placed in handcuffs for them to be considered in custody, for purposes of an escape charge?

HOLDING: No

DISCUSSION: The Court reviewed the elements of First-Degree Escape. Brown argued that "he was never arrested or restrained because during the struggle, the officer never exercised control over him and therefore he could not have 'escaped.'" The Court noted, however, that the officer "told Brown several times he was under arrest." They struggled, and the "fact that the officer was never able to place Brown in handcuffs is of little consequence." The Court concluded that the evidence indicated that "Brown was in custody and his fleeing could amount to an escape."

Brown's conviction was affirmed.

PENAL CODE – ROBBERY

Nutter v. Com.
2008 WL 1850595 (Ky. 2008)

FACTS: On May 11, 2005, two Meijer (Lexington) loss prevention employees watched Nutter "take off his own shoes, put on a pair of new K-Swiss tennis shoes, and remove the tags." One checked the original box and found Nutter's "old shoes" there. The other followed Nutter as he walked from the store. Both employees confronted Nutter in the parking lot and told him to return to the store. Nutter ignored them and continued walking. When one grabbed him, Nutter "retracted his arm and spun around," breaking the grasp. They struggled, and Nutter lost a shoe in the process. Eventually, he broke free and fled. One of the employees saw Nutter pull out a small knife, and during a further struggle, one of the two employees was cut. The other chased Nutter while calling the police, but stopped chasing when a motorist said they would follow him. Nutter ran, losing the other shoe in the process, and was eventually found by police hiding in some bushes nearby.

Nutter was charged with First-Degree Robbery and PFO.

ISSUE: Is a use of force to escape apprehension, committed after the theft is completed, sufficient to charge robbery?

HOLDING: Yes

DISCUSSION: Nutter argued that the incidents should be considered separately, a theft and an assault, rather than a robbery, because the theft was already complete when the use of force (during the struggle with the guards) occurred. And, further, that "he had already abandoned half the pair of shoes before any force was used, and then subsequently abandoned the other shoe."

The Court quickly disagreed, however, finding that it is appropriate to consider that the "use or threat of force during escape from a completed or attempted theft [satisfies] the 'in the course of committing theft' requirement of the charge of robbery.[1]

Nutter's conviction was affirmed.

Stewart v. Com.
2008 WL 1837318 (Ky. App. 2008)

FACTS: On April 3, 2005, Dustin and Jeffery Stewart, brothers, "undertook a purse snatching spree across Pike County." They would "drive up next to their intended victim" in their vehicle, and then "the passenger would lean out the window, grab ahold of the purse of the victim, and the resulting force would break the purse strap." Two of the victims testified at trial. The jury convicted Dustin Stewart of Robbery in the Second Degree for one, and in the First Degree for the second.

Stewart appealed the First Degree Robbery conviction.

ISSUE: May a vehicle used in a robbery, which endangers the vehicle, be considered a dangerous instrument?

HOLDING: Yes

DISCUSSION: Stewart argued that the use of the Jeep in the robbery did not constitute the use of a dangerous instrument, as it never touched the victims. The victim, however, testified that had the strap not broken, she "would have been either in the road or dragged by the vehicle." She did not seek medical treatment for injuries she claimed, however, because she lacked insurance.

The Court found that from the victim's testimony, there was ample evidence to consider the use of the vehicle to be consistent with it being characterized as a dangerous instrument. Further, the Court found that medical testimony is not required to prove an alleged injury.

Stewart's conviction was upheld.

[1] See Mack v. Com., 136 S.W. 3d 424 (Ky. 2004).

SEARCH & SEIZURE - ANONYMOUS TIPS

Com. v. Brown
250 S.W.3d 631 (Ky. 2008)

FACTS: On March 11, 2002, Det. Ford (Lexington PD) "began receiving anonymous phone calls from a woman claiming Brown was selling cocaine." He received a total of about seven calls from "Lady X." She described Brown's activities in detail, and provided an address and vehicle information. Det. Ford was able to corroborate much of the caller's information.

> On September 12, 2002, at approximately 5:30 p.m., Ford received a call from Lady X telling him that Brown was "leaving at that moment" in the black car with a quantity of cocaine and was going to make some deliveries of the cocaine in a specified area of town. Ford decided to round up some other officers, including Sergeant Edward Hart, to assist him in locating Brown and investigating the complaint. The officers headed to the area which Lady X had mentioned. While waiting at a stoplight, Sergeant Hart observed a man who looked like Brown driving the black car through the parking lot of a Hollywood Video store. Hart radioed this information to Ford.
>
> Sergeant Hart subsequently located the car in a parking lot behind a Huddle House restaurant near the employee entrance. Hart observed a person wearing a Huddle House apron approach and stand by the car. Based upon the collective information he had received, observations he had made that day, and his own experience, Hart believed that a drug transaction was occurring. Hart again radioed Ford and informed him about the suspected drug buy going down. Hart waited for Ford to get closer, and then they both pulled into the parking lot. Hart pulled his vehicle in at an angle behind Brown's car, and Ford parked his vehicle beside Brown's car.

The officers approached, and York, the Huddle House employee got excited and backed away from the car.

> One of the officers observed Brown pull something out of his pocket, and both officers saw Brown put something into his mouth. . The officers extracted Brown from the vehicle. They ordered him to spit out what he had put into his mouth, but he did not initially comply. A white paste began forming around Brown's mouth, a symptom consistent with cocaine ingestion. While being handcuffed, Brown continued to chew and swallow. He soon began exhibiting other medical symptoms consistent with having swallowed cocaine. Emergency medical personnel were called, and Ford rode in the ambulance with Brown to the hospital. Brown indicated to the paramedics that he had swallowed cocaine. He eventually spit out a piece of paper."

The other man told officers that he was purchasing cocaine from Brown, and the amount of money he stated he paid was found in Brown's car. No drugs were found in the car other than what Brown

ingested. Brown was charged with Trafficking, Tampering with Physical Evidence and PFO. He moved for suppression of the evidence, and of incriminating statements he made, arguing that the stop was unlawful.

The trial court disagreed and refused to suppress. Brown took a conditional guilty plea, and appealed. The Court of Appeals reversed the decision of the trial court, however, and the prosecution further appealed.

ISSUE: Is the predictive nature of an anonymous tip used to justify a stop important in determining the credibility of the tip?

HOLDING: Yes

DISCUSSION: First, the Court noted, Brown was actually not stopped, as his car was not moving when they approached, but arguably, he was seized. As such, they agreed that "the officers were conducting an investigatory stop when they observed Brown swallowing the evidence as they walked up to his vehicle."

Because the officers' actions were ultimately based on an anonymous tip, the Court reviewed the precedent for such interactions based on such tips. What the Court deemed important was the tipster's ability to predict [the suspect's] "future behavior," a factor present in this case as well. "The tipster stated that Brown was leaving right then in his wife's car and was going to a particular part of town to deliver drugs." This predictive behavior, in addition to the apparent drug deal going down, was found to be sufficient corroboration of the tip for "articulable suspicion." The Court emphasized that Det. Ford had "received a steady stream of information from the same anonymous caller concerning Brown," and he had "solicited the assistance of another officer to place Brown under surveillance." The officers observed him taking actions that they recognized as a drug transaction.

The Court upheld the denial of suppression, and also, ruled "that Brown's incriminating statement allegedly made to emergency medical personnel and law enforcement during the course of his medical treatment is neither tainted nor inadmissible." The decision of the Court of Appeals was reversed, and the trial court's decision, and Brown's plea, were affirmed.

SEARCH & SEIZURE – SEARCH WARRANT

Jenkins v. Com.
2008 WL 2484938 (Ky. 2008)

FACTS: In April, 2005, the Monroe County Sheriff's Dept. got a tip that "there was illegal drug activity occurring on a farm owned by [Jenkins's] father." Jenkins lived on the property, in a structure separate from the main house that was described as a "converted calf barn." Since this was not the first tip they received, Deputy Geralds "went to the property to determine if he could observe any suspicious behavior." Based upon his observations, the deputy submitted the following affidavit:

> *Affiant has been an officer in the aforementioned agency for a period of 3 years and 1 month … Affiant received information from a confidential informant that Lee Jenkins had methamphetamine, marijuana and the ingredients to manufacture methamphetamine. All of the items were for sale. Acting on the information received, Affiant conducted the following independent investigation: Completed a drive-by of the premises. The vehicles as described by the Confidential Informant were present and a high volume of traffic has been observed entering and exiting the premises. Affiant has reasonable and probable cause to believe, and believes, grounds exist for the issurance (sic) of a search warrant based on the aforementioned facts, information and circumstances[.]*

The warrant was signed. The officers searched the barn and found chemicals related to the manufacture of methamphetamine, marijuana and paraphernalia. Jenkins was indicted and convicted, and then appealed.

ISSUE: Must a search warrant indicate the source of credibility of an anonymous informant?

HOLDING: Yes

DISCUSSION: Jenkins argued that the "affidavit upon which probable cause was based did not describe the informant's reliability or basis of knowledge, and that the officers failed to adequately corroborate the tip." Deputy Murphy testified that the CI "was known to the officers and had provided credible information in the past." The information was conveyed in person to the deputies. Further, the deputy stated that they had received prior complaints about the Jenkins' farm, specifically, that people were known to congregate there and party.

The Court noted, however, that the affidavit did not, itself, discuss the credibility of the informant. The Court found that the affidavit "is nearly identical to the 'bare bones' affidavits specifically condemned in" Illinois v. Gates.[2] The tip itself was "extremely general in its assertion of illegality; it did not reveal the informant's intimate knowledge of either [Jenkins] or the property; and it lacked any predictive information whatsoever."

The Court stated:

> A deficiency in the reliability of an informant's tip can be cured by independent police investigation and corroboration. Such did not occur in this case.

The deputies did only a brief surveillance, during which they observed a single vehicle leaving and one arriving. That was in conflict with the statement made by the affidavit, but it was unclear if the "high volume of traffic" referenced in the affidavit was information provided by the CI. The Court noted that "two vehicles in thirty minutes does not constitute 'traffic' even in rural Monroe County."

The Court found that the trial court should have suppressed the evidence. However, the government argued that good faith should have saved the evidence. The Court found that the

[2] 462 U.S. 213 (1983).

affidavit "provided virtually no substantive detail concerning the particulars of the confidential tip or the tipster's reliability." As such, the Court found that "independent police corroboration of the tip became vital," and it had "little doubt that the issuing judge relied heavily on this element in determining that probable cause existed." Unfortunately, however, the only piece of corroborating evidence was shown to be a "misleading statement that did not accurately reflect what was actually observed."

The Court remanded the case back to Monroe Circuit Court to conduct a hearing to determine if the good faith exception should apply, in light of the deputy's conflicting testimony at trial.

Jessica DeYoung v. Com.
2008 WL 1919873 (Ky App. 2008)

FACTS: In August, 2006, the Cabinet for Health and Family Services (CHFS), in McLean County, fielded a complaint about the DeYoung's drug usage in front of their children. On November 1, while that investigation was still open, they received an additional allegation, but an individual who claimed to have purchased methamphetamine at the DeYoung home just a short time before that date. For conflict reasons, the Daviess County CHFS office, specifically Neal, was assigned to investigate. Neal contacted Sheriff Cox, McLean County, to make a home visit, and the Sheriff also learned there was an outstanding warrant for Jessica DeYoung.

On November 2, Sheriff Cox, Officer McDowell (and his K-9), Deputy Payne and Neal went to the DeYoung home. When they arrived, Jessica DeYoung ran upstairs. Sheriff Cox chased her, and encountered Jonathan DeYoung, as well. Both were ordered to come downstairs. The Sheriff explained the warrant and the complaints received by CHFS. Jonathan DeYoung "became agitated" and he was taken to another room to calm down. There, he was asked if he was armed, which he denied. The officer saw a bulge and did a frisk, finding a pocket knife and a tin container with methamphetamine. Jonathan was arrested.

Jessica DeYoung was asked for consent to search the house, and refused. Upon a third asking, she finally consented, but the trial court later found that consent to have been coerced. The dog entered and "hit on a number of objects." At the same time, Neal spoke to the children, and the five-year-old described a lot of people coming to the house and leaving with "white stuff" that was kept at the house. Neal told the Sheriff what the child had said.

Using the above information, the sheriff sought, and obtained, a search warrant. Drugs and paraphernalia were found as a result of the search. The DeYoungs were arrested and subsequently moved to suppress. The trial court agreed that Jessica DeYoung's consent was coerced and that the seizure of the tin was also impermissible, "as there was no testimony that the officer suspected the tin contained contraband." However, the trial court denied the suppression, because it found that even stripping the improperly gained information from the warrant, "there was still enough probable cause to base a finding of cause to issue the warrant." The DeYoung's appealed.

ISSUE: Does the elimination of challenged information from a warrant automatically make the warrant invalid?

HOLDING: No

DISCUSSION: The appellate court agreed that even if the consent, and the drugs identified by the dogs subsequent to the consent, were removed from consideration, that the information the sheriff had in addition was more than sufficient to support the warrant. The Sheriff, the deputies and the CHFS, were all properly at the house, in response to a legitimate complaint and investigation.

The denial of the suppression motion was upheld.

Jonathan DeYoung v. Com.
2008 WL 2152257 (Ky. App. 2008)

FACTS: See facts, above.

DeYoung was charged on the basis of the items found in the house. He took a conditional guilty plea, and appealed.

ISSUE: Does a tainted consent, which was not used to actually seize evidence, invalidate a later search pursuant to a lawful warrant?

HOLDING: No

DISCUSSION: The court chose to dismiss, immediately, most of DeYoung's assertions, leaving only the issue of "whether deploying the dog to explore for contraband was an illegal search." The court noted that "nothing was actually seized as the result of this tainted consent." The Court noted, as did the trial court, that Sheriff Cox did get a search warrant, and that even stripping out the information concerning the discoveries by the drug dog, that the Sheriff's other, lawfully obtained, information was sufficient to support the probable cause for the search.

DeYoung's plea was upheld.

Tidwell v. Com.
2008 WL 2152236 *(Ky. App. 2008)

FACTS: On April 12, 2006, the Rays watched as a man walked down a street in Pike County, carrying several items from Mrs. Ray's sister's home (the Rivards) to a nearby trailer. The Rays went to the Rivards' home and found it had been broken into and ransacked, and that a number of items, including one they had seen the man carrying, were missing. They called the police, explained what they had seen, and stated that although they did not recognize the man they had seen, that the trailer in question was owned by Varney.

Trooper Leonard (KSP) went to investigate. No one was at the trailer, but he could "see a television and other items on the floor which the Rivards later identified as stolen." Trooper Leonard obtained a warrant and returned, still finding no one home. He searched the trailer and recovered a number of stolen items.

Varney was questioned, and he testified that a former stepbrother, Tidwell, was living in the trailer in exchange for maintaining it. Varney also suggested the troopers check with a local unlicensed pawn broker, Tussey. Tussey told the police that Tidwell had brought jewelry to his home, and that one of the women with Tidwell claimed it had belonged to her grandmother. He had paid $200 for the jewelry, which was later identified by the Rivards. A search of his home, pursuant to a warrant, revealed more stolen goods.

Tidwell was arrested in West Virginia and agreed to return to Kentucky. During the ride back, he made statements to the transporting officers. As a result, more jewelry was recovered from two other pawn shops.

Tidwell was indicted on burglary and theft charges, as well as PFO. He was convicted of theft and PFO. He then appealed.

ISSUE: Is a missing search warrant affidavit fatal to a case?

HOLDING: No

DISCUSSON: Tidwell first argued that there was insufficient evidence that he was ever in possession of any stolen goods. The two women were not called to testify, nor apparently, did the Rays make an identification of Tidwell. The Court, however, disagreed, particularly when combined with a statement he made to one of the troopers. The Court also agreed that it was appropriate to refuse to submit the lesser-included offense of misdemeanor theft to the jury, given the obvious combined value of the items.

Tidwell also argued that the search warrant lacked a supporting affidavit. The affidavit was not included with the trial record, but during a suppression hearing, Trooper Leonard testified that he had sworn to an affidavit and was able to essentially reconstruct the affidavit. Eventually only the front page of the search warrant was actually entered into evidence. The Court, however, noted that the primary issue was whether Tidwell even had standing to raise the issue, since he denied that he "ever lived in or possessed any control over the trailer." As such, he had no expectation of privacy in the items found in the trailer.[3]

The Court found that the evidence indicated that the affidavit was properly completed and signed by a trial commissioner. The trooper testified that he sent it for filing, but did not keep a copy for himself. The search warrant was ruled valid.

Tidwell also argued that photographs of him taken during the execution of the search warrant and presented to the Rays for identification were improper. In fact, the Rays were unable to make an identification, and thus the use of the photos, even if seized improperly, was actually exculpatory. Further, the Court found that the photos were in plain view – and depicted a man wearing a black hat, just as described by the Rays. The photos showed a connection between Tidwell and the crime, and Tidwell in the trailer, and as such, they could be considered immediately incriminating. The Court found any error in seizing the photos to be harmless.

[3] Rawlings v. Kentucky, 448 U.S. 98 (1980).

Tidwell's conviction was upheld.

Charles v. Com.
2008 WL 2484958 (Ky. 2008)

FACTS: Sexton was working with Letcher County SO as an informant. On April 29, 2004, she set up a controlled buy from Charles and the deputy investigating the crime fitted her with a recording device. Sexton and Charles met for the transaction, and money and an Oxycontin tablet were exchanged. Sexton then met with Deputy Clemons and handed over the pill and the recording device. On May 5, Deputy Clemons recorded a telephone conversation between Sexton and Charles concerning the sale of 60 Xanax pills. Again, the deputy provided the money, and they drove to a location where the deputy could observe the transaction. The exchange was made. In this incident, the location was within 1,000 yards of an elementary school.

On May 11, the deputy got a search warrant for Charles's home and vehicle. During execution of the warrant, the deputies found only two pills, one each of Oxycontin and morphine. Charles was charged with Trafficking. She requested suppression, but the trial court denied it without a hearing. She was convicted, and appealed.

ISSUE: If information from an informant is corroborated, is it necessary to also indicate their record for reliability?

HOLDING: No (but still good practice)

DISCUSSION: The Court reviewed the affidavit, and found that although the requested hearing should have been held, that the trial court's error was harmless. The Affidavit in question stated that:

> *On the 28th day of April 2004, at approximately 4:00 p.m., affiant received information from: a cooperating witness, whose information is known to be reliable, that Joetta Charles was selling Oxycontin 80 m.g . for $80.00 each[.]*
> *Acting on the information received, affiant conducted the following independent investigation : On 04-29-04 by means of a controlled purchase a cooperating witness purchased a quantity of Oxycontin from Joetta Charles. On 05-06-04 by means of a controlled purchase a cooperating witness purchased a quantity of Xanax from Joetta Charles within 1000 yds. of a school. During the purchase Joetta Charles stated that on Monday 05-10-04 that she would be filling her prescriptions and that she would have more Xanax and also some Lorcet 10 mg to sell. On both occasions Joetta was operating a gold 4DR Saturn passanger [sic] car.*

The Court noted that the affidavit indicated that Charles would have an additional source of pills when she got a new prescription. Although there was no information on the informant concerning their reliability the officer did properly corroborate the information provided. The Court found that a hearing would not have changed the result.

The Court further agreed that it was permissible for a witness to interpret what was being said on part of the recording made of the transaction. The witness also interpreted certain comments (like "little footballs" for Xanax) that would otherwise have meant nothing to the jury. The Court noted that it is permissible to have a person with knowledge of drug matters assist the jury by explaining the meaning of drug language.

Charles's conviction was affirmed.

Stith v. Com
2008 WL 1920629 (Ky. App. 2008)

FACTS: On February 14, 2006, Stith and her estranged husband (who happened to be the county coroner) were "embroiled in a bitter divorce and custody battle" over two minor children. On that day, the older child found what was later determined to be cocaine in his mother's master bathroom. He called his father, who called Sgt. VonDerHaar (Boone County SO) to report what had been found. Officer Parsons went to the home to secure the premises, and Det. Cochran was assigned the case. Det. Cochran submitted the following affidavit in support of a search warrant.

> *Affiant has been a law enforcement officer for a period of nine (9) years, and the information and observations contained herein were received and made in his capacity as an officer thereof.*
>
> *On Tuesday, February 14, 2006 at approximately 1545 hours, the Boone County Sheriff's Department received a phone call from Doug Stith, Boone County Coroner. Doug Stith stated to Sgt. Tony VonDerHaar that his seventeen (17) year old juvenile son, Brett Stith, had information that there was possible illegal narcotic substances located at 1107 Samuel Court, Union, KY 41091. Sgt. VonDerHaar thereafter contacted Affiant and assigned Affiant to the case.*
>
> *Acting on the information received, Affiant conducted the following independent investigation:*
>
> *Affiant contacted Brett Stith and spoke directly with him concerning what he observed in the residence of 1107 Samuel Court, Union, KY 41091. Affiant states that Brett Stith lives at the residence of 1107 Samuel Court, Union, KY 41091 with his brother and his mother, Barb Stith. Brett Stith told Affiant that at approximately 1530 hours on February 14, 2006 he was grooming in the master bathroom located at his residence at 1107 Samuel Court, Union, KY 41091. Brett Stith told Affiant that at that time, he opened the middle drawer of the vanity in the master bathroom and observed the corner of a small plastic baggie, with a small amount of a white powdery substance inside. Also located in the drawer was a glass dipping sauce container which appeared to have burn markings on the bottom. Brett Stith told Affiant that he immediately contacted his father, Doug Stith, and told him of the discovery, and that the time of that call was 1540 hours.*

> *Affiant is aware from ongoing, active investigations concerning Barb Stith, that her family is concerned that she may be involved in substance abuse. Affiant is aware that Barb Stith does abuse alcohol on a regular basis.*
>
> *Affiant states that the description of the observations made by Brett Stith is consistent with the manner of packaging and use of illegal controlled substance activity based upon Affiant's training and experience with said illegal controlled substances.*

The affidavit was signed and executed. Officers found two bags of powder cocaine during the search. Stith was located at a nearby bar and arrested, and more cocaine was found during the search incident to arrest. She was indicted and moved for suppression. When that was denied, she went to trial and was convicted.

ISSUE: Must information from a known, named informant, that is rich in detail, be corroborated to be used in a search warrant?

HOLDING: No

DISCUSSION: Stith argued that the search warrant did not establish probable cause to search her home. Det. Cochran had acknowledged several misspellings and minor errors in the warrant. Stith, however, argued that the warrant indicated nothing to show that her son "had a basis of knowledge about illegal drugs," that the detective "did not corroborate the information he received," and that the "affidavit was based in large measure on hearsay."

Taking each in turn, the Court found that the "detail of [the son's] description combined with Det. Cochrans's training and experience in recognizing unique illegal drug packaging made it more likely evidence of a crime would be found in the Stith home." Because the information was received directly from a named (and to some degree known) informant, the need to corroborate the information was much less. The son's "firsthand observations" – given directly to Det. Cochran – were "inherently reliable because of their 'richness and detail.'" Nothing indicated that the son bore any "animosity toward his mother or favored his father such that he would fabricate a story alleging his mother was involved in criminal drug activity."

Further, the Court did not fault Det. Cochran for not taking further action to investigate before seeking a warrant, finding that the information he already had was more than sufficient to move forward. The issue of hearsay was simply discounted.

Stith's conviction was upheld.

Upchurch v. Com.
2008 WL 1918125 (Ky. App. 2008)

FACTS: On Oct. 21, 2005, Dep. Davis (Wayne County SD) received a CI tip that there was a "large quantity of marijuana" on Upchurch's property. The informant had proved reliable in the past, and provided a detailed description of the property. Davis was able to corroborate the property description, and further, had received other tips concerning Upchurch.

Davis sought a search warrant, which was signed. The next day, Wayne County deputies executed the warrant. As soon as they entered, "they detected the 'strong odor of marijuana.'" They found bagged marijuana, a total of 9.4 pounds, scattered around the property, as well as an "unlabeled bottle containing five hydrocodone tablets." Upchurch was arrested, and found to be armed.

Upchurch was indicted for trafficking in marijuana and possession of the hydrocodone. The charge was amended to trafficking while in possession of the firearm. He moved for suppression, challenging the reliability of the informant and other alleged defects in the warrant. The trial court found the affidavit was valid on its face. Upchurch took a conditional guilty plea, and appealed.

ISSUE: Must a warrant include the "basis of knowledge" of an informant's tip, if it is otherwise based on reliability and corroboration?

HOLDING: No

DISCUSSION: The Court reviewed the warrant and concluded that although the "affidavit does not state the informant's basis of knowledge, it does specifically provide that the informant had provided the Deputy with reliable information in the past and Deputy Davis verified the tip to the extent possible." As such, "the showing of the informant's veracity and reliability as well as Deputy Davis' partial corroboration of the tip compensate for the affidavit's failure to state the informant's basis of knowledge."

Davis's plea was upheld.

SEARCH & SEIZURE - PROBATION & PAROLE SEARCHES

Lacey v. Com.
2008 WL 2468806 (Ky. App. 2008)

FACTS: On March 1, 2006, Probation and Parole Officer LaFollette was informed by Columbus, Ohio, officers that Lacey (one of his parolees) had been arrested for possession of meth and the chemicals used in manufacturing meth. Officer LaFollette had also received, about the same time, several anonymous tips indicating that Lacey was using and "possibly manufacturing the illegal substance."

LaFollette decided to search, pursuant to the parole agreement. He contacted Sheriff Hensley (Hart County) and enlisted his assistance. (Sheriff Hensley also had information linking Lacey to drug activity.) On June 12, along with other officers, they went to the Lacey home. Tracy Lacey (Lacey's wife) answered the door and was informed of the reason for LaFollette's visit, and Officer LaFollette further advised her that the Sheriff and deputies were there "for security purposes only."

LaFollette later testified that Tracy denied there were drugs in the house and gave verbal consent to search – this was corroborated by Sheriff Hensley. Officer LaFollette searched the bedroom and found "three bowls containing what he believed to be a controlled substance." Tracy claimed

to have no knowledge of the bowls and was given her Miranda warnings. She called her husband, at LaFollette's request and told him what was going on. Lacey returned, and he claimed responsibility for everything found at the house. He was arrested.

Lacey requested suppression, supported by Tracey's claim that she did not give consent to search the home. To complicate matters, however, a report written by one of the deputies "implies that permission to search the residence was not obtained from Tracey until after LaFollette found the bowls containing the suspected illegal substance." LaFollette acknowledged that "there were mistakes regarding the sequence of events." However, on cross-examination, "LaFollette made what appear to be several conflicting statements." First he testified that he had reasonable suspicion, based upon the information he had received, but then stated that he did not need reasonable suspicion to search. He "further testified that he obtained Tracy's consent because she was the only adult there and he could not have entered without her permission." Finally, he stated that "he needed consent to conduct a search, but subsequently testified that even if Tracy had not given consent, he would have still searched the residence anyway." (He clarified later that he would have gotten permission from his DOC supervisor to do the search, pursuant to agency policy.) The trial court concluded that LaFollete could conduct a home visit without consent if he had reasonable suspicion, but found that Tracy did give consent. The suppression motion was denied. Lacey took a conditional guilty plea and appealed.

ISSUE: Must a P& P officer possess reasonable suspicion to do a home visit search without consent?

HOLDING: Yes

DISCUSSION: The Court reviewed the law on parole officers conducting home visits, and noted that "an officer must possess reasonable suspicion that a parolee is violating the term of his parole to conduct a home visit without consent."[4] However, the trial court based its decision on Tracy's consent, instead. Lacey argued that since she had not given a written consent, there was not substantial evidence that she'd actually given the consent.

The Court noted that the trial court, notwithstanding [Tracy's] contrary sworn affidavit and testimony," … "found LaFollette and Hensley to be more credible."

The Court upheld Lacey's conviction.

SEARCH & SEIZURE – PLAIN VIEW

Ellis v. Com.
2008 WL 1837301 (Ky. App. 2008)

FACTS: On the day in question, Ellis and another man were in Ellis's apartment in Beecher Terrace, in Louisville. A shooting occurred in the area and a witness directed officers to Ellis's door. Officer Glauber (Louisville Metro PD) knocked, and Ellis answered. He gave consent to entry, and inside, the officers "smelled a strong odor of marijuana." Ellis's companion "opened his

[4] Coleman v. Com., 100 S.W.3d 745 (Ky. 2002).

hand to show several buds of marijuana." Officer Judah swept the apartment, opening "a kitchen closet," where he found a "bag of cocaine sitting on a box." He picked up the bag and found another beneath. He showed it to Officer Glauber, and they questioned Ellis, who further admitted to having a joint in the bedroom. Both Ellis and his companion were arrested.

At the station, Ellis demanded a phone call, and Officer Glauber loaned him a cell phone. Glauber "inadvertently heard part of the conversation and gleaned from it that Ellis had guns in his apartment." The officers got a search warrant and found two guns; one was inside the kitchen trashcan, under the plastic bag liner and near the drugs that had been found. Both men were indicted on a variety of charges.

Ellis requested suppression. His demand was denied after Officer Glauber's testimony. At trial, however, Officer Judah "seemed to contradict Officer Glauber's account." Because of that, Ellis again moved for suppression, and again, he was denied. Ellis was convicted, and appealed.

ISSUE: Are items found in plain view admissible?

HOLDING: Yes

DISCUSSION: The Court admitted the cocaine found by Officer Judah as being found in plain view. Ellis argued that the "contraband nature of the bags of cocaine" was not "readily apparent" and thus was not admissible. The Court noted that only Officer Glauber had testified at the initial suppression hearing, and that his testimony indicated that the cocaine was sitting on top of the box when he was shown it by Officer Judah. At trial, however, Officer Judah indicated that he saw part of the bag sticking out of the box, initially, and investigated further, finding the additional bag. The Court, however, in studying Officer Judah's testimony closely, determined that Officer Judah testified that he "noticed a large bag of cocaine on top of the box when he opened the closet door" and that when he picked it up, he found another, beneath it. He was never asked, directly, whether "he could see the cocaine in the bag" before he picked it up. The Court found that the statements were not, actually, contradictory, and ruled that the cocaine was, in fact, in plain view. The Court found the cocaine was admissible.

The Court further found that Ellis could be held responsible for the weapons found in his apartment, and affirmed his conviction.

SEARCH & SEIZURE – TERRY

Com. v. Stephens
2008 WL 2167980 (Ky. 2008)

FACTS: On Feb. 1, 2005, Officer Larrabee (Lexington PD) was patrolling in the Coolavin Park area, specifically, "two breezeways of the first building in this area, where people commonly gathered to buy and sell drugs." He spotted Stephens walk into the area and stay a few minutes. At the same time, a woman asked Officer Larrabee for directions, and he was still talking to the woman when Stephens emerged. Stephens glanced at him and appeared to be nervous. Stephens approached the woman who was asking for directions, and spoke to the woman's

daughter, in the passenger seat. She then walked away. "Larrabee asked the women in the car what Stephens had said, and the woman stated that Stephens was looking for her sister and had inquired if they had seen her." The woman (and her daughter) left the scene.

Larrabee parked his car and approached Stephens on foot. He called to her, and she turned and approached him. He asked her purpose for being in the area, and she stated she was looking for her sister. He asked for ID, but she said she had none. He asked her for her name, social security number and date of birth, and she gave what was later determined to be a false name. She gave a date of birth and age that did not match, but corrected it when the discrepancy was pointed out. Larrabee ran the information and found no criminal record, but he warned her that giving false information to an officer was a crime. Stephens insisted the information she gave was correct. She told him she had a Florida operator's license, but when he checked Florida records, he found no license under the information she gave him.

Larrabee asked her if she had any drugs or paraphernalia, which she denied. She agreed to a frisk. Officer Larrabee then found a crack pipe in her coat pocket and arrested her. A further search at the jail revealed a rock of crack cocaine.

Stephens was indicted on drug and other charges. She requested suppression. (It was only during that hearing that she admitted her true name, the false name she gave was one of her sisters. She stated she gave the false name because she though she had an outstanding warrant in Scott County.) The Court found that Larrabee had "reasonable, articulable suspicion to conduct the investigative stop of Stephens." Stephens took a conditional guilty plea, and appealed. The Court of Appeals reversed the trial court's decision, finding that the investigatory stop occurred when the officer "initially asked to speak with [Stephens], and that he did not have reasonable suspicion at that time to make the stop." The Commonwealth appealed.

ISSUE: Does asking for information and/or ID convert a stop into a Terry stop?

HOLDING: No

DISCUSSION: The Court noted that the facts of the case were not in dispute. The Court agreed that "based on the facts and circumstances surrounding Stephens's interaction with Officer Larrabee, Stephens was not subject to an investigatory stop within the meaning of the Fourth Amendment when Officer Larrabee initially asked to speak with her." Simply approaching someone on the street is not a Terry stop; instead, the Court called it an "encounter." Further, the Court found that asking questions or requesting ID, in itself, does not bring the encounter up to the level of an investigatory stop, either. Nothing in the evidence presented indicated that "Officer Larrabee touched Stephens, used an intimidating tone of voice, or told her that she was not free to leave." As such, the Court found the encounter was still consensual.

However, once he found no criminal record, and continued questioning her, even after she reiterated that the information was correct, the Court found that the encounter had become an investigatory stop. At that point, the officer needed reasonable suspicion to prolong the stop.

The Court noted that at the time of the stop, Officer Larrabee knew that "Stephens had spent approximately three minutes in an area known to be high in drug trafficking, she appeared nervous,

and she initially gave an age that did not match her date of birth." Larrabee noted at the suppression hearing that he found it odd that she approached the passenger in the other car rather than ask him about her sister. The Court found that it was a close call, but that it did not find that information sufficient to justify the stop.

The Court found that because the stop was "not supported by a particular, reasonable suspicion, the seizure of the crack pipe was improper and the evidence should have been suppressed." Even though she gave consent, the consent was tainted by the improper stop. The Court upheld the suppression and remanded the case back for further proceedings.

Com. v. Marr
250 S.W.3d 624 (Ky. 2008)

FACTS: In August, 2001, Officer Bailey (Louisville PD) testified that police had received an anonymous tip about methamphetamine being sold from a body shop. They began surveillance, and noted a number of visitors arriving for short periods of time who "did not appear to be bringing in cars for body work." They pulled over a vehicle as it left, and it was found to contain two pounds of marijuana. The officers decided to enter the body shop. They told the owner that they were conducting a narcotics investigation. Despite hearing noise from the back, the owner (who "seemed nervous) denied anyone else was present. Officer Bailey called for whoever was in the back to come out, and Marr (who matched the general description given by the tipster) emerged. Marr also appeared nervous. Officer Bailey did a frisk, and found "'hitters' used to ingest drugs, and two small, plastic bags of methamphetamine," along with a large amount of cash. The officers received both verbal and written consent to search Marr's residence, where they found weapons, methamphetamine and a lab.

Marr was arrested, and requested suppression. The trial court found that Officer Bailey lacked a "reasonable and articulable suspicion that Marr was engaged in criminal activity to justify the pat-down search." The Court further found that the consent for the residence search was vitiated by the initial improper search, and suppressed all evidence. Upon appeal, the Court of Appeals affirmed the decision. The Commonwealth appealed.

ISSUE: May a frisk be done when the officer develops reasonable suspicion of a safety hazard?

HOLDING: Yes

DISCUSSION: The Court noted that this case was different from that usually found in anonymous tip cases - in that the officers had already determined that the traffic into the business was unusual and consistent with drug activity. In addition, they had already found one visitor to the business to be in possession of a large amount of drugs. As such, Officer Bailey was legitimately suspicious, and more so when the body shop owner lied about anyone else being present. In fact, the anonymous tip was "suitably corroborated" by the information learned later, pursuant to the investigation. The Court found that "[w]hether the tip provided basis to believe criminal activity was afoot or not, the additional factors listed above clearly allowed the officer the reasonable basis to do a pat-down search for his own safety at that point." Further, the "confluence of facts and the suspicion of drug activity in this building made the situation inherently dangerous."

The Court of Appeals decision was reversed.

SEARCH & SEIZURE – SEARCH INCIDENT TO ARREST

Com. v. Sies
2008 WL 1991696 (Ky App. 2008)

FACTS: On September 22, 2006, Sies was stopped by Dep. Walters (Boone County SO) for speeding. When Dep. Walters learned she had a suspended license, he arrested Sies. He searched her car pursuant to the arrest, but found nothing of interest. He then rolled up the car window, shut off the car and retrieved her purse and cell phone, returning with them to his car. Sies was taken to jail.

When they arrived, the deputy searched the purse and found a syringe. He advised Sies of her Miranda rights. He continued searching, including cutting open her purse, and he (along with another deputy) found additional syringes, cotton swabs with residue and a metal spoon. The evidence processed by the lab indicated traces of heroin, morphine, cocaine and codeine. In addition to the original traffic offenses, Sies was further charged with various offenses related to the drugs and the paraphernalia. Sies demanded suppression, and the trial court agreed, finding the "search of Sies' purse was not performed incident to an arrest." The Commonwealth appealed.

ISSUE: May a purse (or other container) be searched some time after the arrest, and still be considered incident to the arrest?

HOLDING: Yes

DISCUSSION: The Court looked to Com. v. Ramsey[5] and New York v. Belton[6] for guidance, and concluded that "the passenger compartment of an automobile may be searched contemporaneous to a lawful arrest of the occupant of an automobile." The Court found that dispositive, and further noted that it was "unreasonable to expect an officer to leave a purse in an abandoned car, regardless of whether it was being towed or left on the side of the road" because '[p]urses typically contain personal and valuable objects which would be a target for a thief." Dep. Walters testified that he collected the purse as standard procedure. The Court noted that:

> Because the purse would be subject to search within the confines of the vehicle we do not believe it to be any less subject to search once removed from the vehicle. An unsearched handbag can pose as great of a risk to a police officer as can an unsearched vehicle. The purse could have contained a handgun, knife, or other dangerous object. Furthermore, a purse, analogous to the jacket in Belton, supra, can contain evidence which the arrestee placed there in an attempt to hide it from an approaching police officer.

[5] 744 S.W.2d 418 (Ky. 1987).
[6] 453 U.S. 454 (1981).

The Court further agreed that although it was not familiar with the "exact booking procedures" for the jail, that it felt "it safe to assume that the contents of Sies' purse would have been inventoried and the contraband discovered upon her booking, had it not been found earlier." As such, the Court ruled that even if the initial search was improper (although it found it was, in fact, alright), that it would have been "admissible under the inevitable discovery rule."[7]

The Court found the suppression of the evidence to have been an error, and reversed that decision, remanding the matter back to the trial court for further proceedings.

SEARCH & SEIZURE – VEHICLE STOPS

Fischer v. Com.
2008 WL 1921319 (Ky. App. 2008)

FACTS: On Aug. 3, 2005. Det. Hagan (Louisville Metro PD) was observing Fischer's home as a result of complaints of drug trafficking. They followed Fischer from his home, and after observing several traffic violations, they watched him pull into a Kroger parking lot. He drove up and down several rows, passing empty spaces, and parked next to a van. He then spoke to the occupant. Both vehicles drove to a nearby McDonald's.

The officers followed and stopped in the driving lane. As Fischer got out, "Hagan activated the emergency lights to identify himself and the other officer as police officers." Hagan showed his badge and explained his purpose. He asked Fischer if he had marijuana, cocaine or crack on his person, which Fischer denied. When he asked about methamphetamine, however, "Fischer simply looked at the ground." When pressed, Fischer admitted to having methamphetamine, and produced it. "Hagan patted Fischer down to make sure he had no other drugs, weapons, or paraphernalia." Fischer further admitted that he had additional drugs at his home and gave the officers oral consent to a search there. When they arrived, Fischer gave them a written consent and unlocked the safe where he stored the drugs. They found meth both in the safe and elsewhere in the house, as well as $3,000 on his person.

At a later hearing, Hagan admitted he had not given Miranda warnings, and that Fischer's wife, who was present, did not refuse consent. She later testified, however, that Fischer had refused to sign the consent form. She stated that Hagan had then threatened her with being charged along with Fischer, and told her that her child would be taken from her. She claimed that Fischer had ultimately signed the form due to the threat.

Fischer was charged and took a conditional guilty plea. He then appealed.

ISSUE: Is approaching a vehicle already stopped a "vehicle stop?"

HOLDING: No

DISCUSSION: The Court agreed with the trial court's finding that the "officers did not seize

[7] Richardson v. Com., 975 S.W.2d 932 (Ky. App. 1998).

Fischer when they first approached him in the parking lot." "Fischer had already parked and was getting out of his vehicle when Hagan turned on his emergency lights." Fischer was not blocked in by the police car, and Hagan "approached Fischer 'casually' and the tone of the conversation" was normal. Although the badge and lights "might turn some encounters with police into seizures, here these items were simply a way for Hagan, who was dressed in plain clothes and driving an unmarked vehicle, to identify himself as a police officer." Although Hagan agreed he was not going to let Fischer leave, "an officer's subjective intent is irrelevant except insofar as it may have been conveyed to the detainee."[8] Further, as soon as Fischer produced the drugs, Hagan had probable cause to arrest Fischer.

With respect to the Miranda warnings, Hagan testified that he did not advise Fischer of Miranda because he never arrested him. (He gave Fischer a citation, instead.) The Court found that a consent to search is not "an incriminating statement … because the consent is not evidence of a testimonial or communicative nature."[9] As such, the evidence found was not subject to suppression because of a questioning concerning Miranda. Although the Court noted that Fischer had "a strong case in this regard with respect to any statements he made after he was taken into custody," that the specific statements he allegedly gave were not before the court to decide.

The Court upheld Fischer's conviction.

Stone v. Com.
2008 WL 351669 (Ky. App. 2008)

FACTS: On Aug. 8, 2004, Officers Green and Lankford (Louisville Metro PD) were patrolling a Louisville apartment complex known to have a high crime rate. At about 8:30 p.m., they spotted Stone "sitting in a legally parked motor vehicle in front of an apartment building." He continued to sit for several minutes. Although the engine was not on, the brake lights were lit.

Officer Green parked directly behind Stone's vehicle, and Lankford's car was behind Green's. Given the positioning of the vehicles, Stone was effectively blocked in. Stone tried to get out as Green approached, but complied when ordered to get back inside. Officer Lankford noted that the steering column was "popped," and both officers noticed a baggie of power on top of the middle console. Officer Green ordered Stone out of the car, and Stone got out, but he then ran from the scene. He was captured, arrested and eventually indicted on trafficking, weapons and related charges.

Stone moved for suppression, which the trial court denied. He was convicted of possession, but not trafficking, and a few other charges. Stone appealed.

ISSUE: Is blocking in a subject's vehicle a seizure?

HOLDING: Yes

[8] U.S. v. Mendenhall, 446 U.S. 544 (1980).
[9] U.S. v. Cooney, 26 Fed Appx. 513 (6th Cir. 2002).

DISCUSSION: Stone argued that the officers lacked sufficient reasonable suspicion to "justify the investigatory stop." The Court agreed that the positioning of the police cruisers effectively blocked Stone into his parking place. He was not permitted to get out and walk away, but was ordered back into his car. These facts indicated he was actually seized and would not feel that he was free to leave. The Court found it "uncontroverted that [Stone] was seated in a legally parked vehicle in front of an apartment building" in the evening. He was violating no law and was approached by no one as he sat in his car. The Court found itself "simply unable to hold that an individual merely sitting in a legally parked vehicle in front of an apartment complex in a high crime area for a few minutes is sufficient to create reasonable suspicion of criminal activity."

The Court ruled that the trial court erred in not suppressing the evidence, and reversed the conviction.

Lawrence v. Com
2008 WL 1851079 (Ky. 2008)

FACTS: On the day in question, Warren County area detectives were "investigating a series of burglaries in area churches." They learned from one of the burglars whom they arrested that some of the stolen property had been traded to a drug dealer," who was described by race, vehicle and cell phone number.

They called the cell number provided and "arranged to meet the person who answered the phone at a designated location." The dealer did not arrive, so they called again, and were directed to another location, a shopping center parking lot. There, they found a Suburban, the vehicle described. However, it wasn't brown, as they'd been told, but was, instead, "pinkish." They watched two men walk into a store and emerge with food.

The detectives had a marked unit stop the Suburban, and as the patrol officer approached the vehicle, the detectives called the cell number. "The detectives were near enough to hear the cell phone ring inside the Suburban and to see Lawrence, the driver of the Suburban, answer the cell phone." The detectives approached and saw "electronic equipment that matched the description of items stolen from the churches" in the rear of the vehicle. Lawrence, the driver, gave consent for the detectives to look at the serial numbers. As he got out, "a bag of marijuana fell at his feet." They arrested Lawrence and searched it, finding "crack cocaine hidden in a seat."

Lawrence was indicted on Trafficking, Ttrafficking within 1,000 yards of a school, and PFO I. He moved for suppression, which was denied. He then took a conditional guilty plea, and appealed.

ISSUE: Does a change in color of a suspect vehicle invalidate a traffic stop?

HOLDING: No

DISCUSSION: Lawrence argued that the initial stop, by the uniformed officer, was improper, and that everything that flowed from the stop was tainted. The Court agreed that the change in the color of the car was "certainly a factor weighing against the legal propriety of the stop." (It was later determined that the vehicle had been crudely repainted, and had, in fact, initially been the color described by the informant.) The Court rejected "Lawrence's contention that the police were

required to do more investigation" but instead, noted that the question before the court "is not what the police could have done, but whether the information actually gleaned by the police gave them articulable suspicion sufficient to stop Lawrence." The Court found that they had sufficient information for a Terry stop, and affirmed Lawrence's conviction.

MISCELLANEOUS – FORFEITURE

Griffith v. Com.
2008 WL 902199 (Ky. App. 2008)

FACTS: Griffith had money ($580) seized from his home during his arrest for drug trafficking. He subsequently pled guilty to possession of a controlled substance, and was duly sentenced. He then requested the return of the cash, and the trial court refused that request, ruling that the money would be turned over to the public defender's office "to recoup the cost of the legal services he received." Griffith appealed, stating that he would not have pleaded guilty had he known his money would have been seized.

ISSUE: May money not subject to forfeiture be held to pay for a suspect's legal representation?

HOLDING: Yes

DISCUSSION: The Court agreed that this was not a legal forfeiture under KRS 218A, because Griffith pled guilty to possession rather than trafficking. However, the Court noted that the cash was seized under KRS 31.211(1) instead, which permits the Court to order a criminal defendant to pay a partial fee for their legal representation. In this case, the Court ruled that ordering the money being held to be paid over to the public defender's office was appropriate, particularly since Griffith signed an agreement of indigency acknowledging that he might be responsible for payment for some of his legal costs.

The diversion of Griffith's money to the public defender's office was lawful and his plea upheld.

Rickard v. Com.
2008 WL 2312609 (Ky. App. 2008)

FACTS: Rickard was arrested, indicted and eventually pled guilty for trafficking in controlled substances (prescription painkillers), and as a result, the Hopkins Circuit Court ordered the forfeiture of vehicles, money and other items. During searches prior to his arrest, the items in questions were seized, and Rickard had agreed to the forfeiture of certain of the items. Other items, however, he claimed were his son's property, and certain of the remaining items were agreed to be "personal in nature and not subject to forfeiture." Items remaining in dispute were two vehicles, cash, coins (foreign and collectible), stamps and store gift cards. The trial court had found all of the disputed items subject to forfeiture, and Rickard appealed.

ISSUE: May items purchased before a subject was proved to be involved in criminal activity be subject to forfeiture?

HOLDING: No

DISCUSSION: First, the Court discussed the two vehicles. The Court agreed that Rickard had used the vehicles to drive to and from the pharmacies where the medications were purchased. However, the Court noted that the statute only permits forfeiture "of vehicles used to transport controlled substances 'which have been manufactured, distributed, dispensed, possessed, being held, or acquired in violation of this chapter [KRS 218A]." Since there was no evidence that he bought the medications illegally, or that he used the vehicles to transport the medications illegally, the Court agreed that the "use of the vehicles was too attenuated from the later criminal acts to warrant forfeiture."

With request to the cash and coins (cash equivalents), the Court noted that Rickard had "large amounts of ordinary currency on or near [his] person" during each search - for a total of approximately $10,000 during three searches. The Court found it only necessary that "some portion of the currency [be] traceable to the exchange or intended violation." Since some of the money was found commingled with money exchanged during controlled drug buys, and the remainder found in close proximity to both Rickard and the drugs, the Court found that the evidence was sufficient. In addition, the Court agreed that the vast amount of assorted change, which was "not sufficiently unique to be distinguishable from the currency," was also subject to forfeiture. However, the Court did not agree that the collectible coins could be traced to the crime and most pre-dated the time during which Rickard was known to be trafficking, and were acquired during a time he was acknowledged to be collecting coins. To the extent that they were mixed with other coins, the Court concluded the Rickard had "presented clear and convincing evidence to rebut [the] presumption that the coins were purchased with illegal proceeds." The Court also found that two $1,000 bills were gifts from Rickard's sister, dated from prior to 2001. There was no indication that the money was given in exchange for drugs. Finally, with respect to the gift cards, the Court found that although there was no direct evidence they had been exchanged for drugs, that one of the detectives had testified that such items (which included lottery tickets, EBT cards and specific store cards) were "commonly used in exchange for drugs." Although the connection was admittedly tenuous, the Court agreed that they were also subject to forfeiture.

The Court found that the vehicles, the collectible coins and the $1,000 bills were not subject to forfeiture, but that all other items were so subject.

SUSPECT IDENTIFICATION

Rhodes v. Com.
2008 WL 2550761 (Ky. App. 2008)

FACTS: On April 25, 2006, in Warren County, an adult male tried to grab A.H., a 13-year-old female, as she was walking home from the school bus. She was able to strike "him in the groin with her knee" and flee to a neighbor's house. He abandoned the chase when the neighbor's dogs "began barking and running toward him."

A.H. went home and told her mother, who called police. A.H. provided a detailed description of the man, and his vehicle, corroborated by the school bus driver. About a month later, Rhodes was arrested on an unrelated warrant, and an investigator realized he matched the description of A.H.'s assailant and was wearing a hat that was like the one the girl described. A.H. "positively identified Rhodes" in a photo line-up.

Rhodes was eventually convicted of attempted kidnapping. He appealed.

ISSUE: Must all subjects in a photo array have the same facial hair?

HOLDING: No

DISCUSSION: Rhodes challenged the photo lineup, arguing that it was "improperly suggestive because of the six individuals shown in the lineup, only one match A.H.'s description of a dark-skinned white man with a dark goatee and dark hair." The Court reviewed the actually lineup and noted that 5 of the 6 have dark hair, their hair was all of approximately the same length, and 3 of the 6 have some combination of goatees and facial hair. Only one is completely clean-shaven. The Court found that the lineup was not unduly suggestive.

Rhodes's conviction was upheld.

EVIDENCE AND TRIAL PROCEDURE

Goodman v. Com.
2008 WL 2167538 (Ky. 2008)

FACTS: Gary and Paula Goodman were married in 1986, and in 2005, Paula Goodman moved out. Gary Goodman was "sad, depressed and confused about his wife's departure." Shortly after she moved out, Gary Goodman learned that she was having an affair and had moved in with Morgan. Kris Goodman, Gary Goodman's son, later testified that his father "started having 'episodes' or 'acting nuts'" and that he had brandished a weapon at his son.

On August 18, 2005, Morgan drove Paula Goodman to her mother's home in Louisville so that she could pick up her vehicle. Gary Goodman spotted them – this was, apparently, the first time he'd actually seen them together. He "made a sharp turn, nearly hitting Morgan's truck in the process." Paula Goodman approached his vehicle, "to tell him she had some papers he wanted." At the same time, Goodman's "clutch 'popped' causing the truck to hit Morgan's truck." Morgan, then, allegedly "came up with a revolver and pointed it at" Gary Goodman, who reacted by pulling his own weapon and trying to fire it. However, because the holster's hammer strap was still snapped, it did not fire. (Morgan later testified that he had not owned a handgun in 25 years.)

Goodman later claimed that he "started blacking out and did not know if Morgan fired at him" but did see "Morgan back up and drive away." He also claimed "he did not recall seeing Paula Goodman running or screaming 'no.'" He did see his own "hand come up and saw the gun fire in her direction." Witnesses saw Gary Goodman follow Paula Goodman to the back of the house (out of sight of the witnesses) and heard several shots. They then saw Gary Goodman "come from

the backyard moving slowly, and then get into his truck and drive away from the scene of the shooting slowly in the direction Morgan had gone."

Paula Goodman was shot four times, with one shot proving lethal. Gary Goodman returned to his own home and told his children that he'd just shot Paula and that the police were coming. (One of his daughters apparently told someone that her father had admitted the shooting, but the daughter later denied it.)

Responding Louisville Metro police officers who went to Goodman's house were told by Gary Goodman's son, Steven, that "his dad had killed his mom and was going to kill him too." Steven took cover behind the police car, while the officers sought cover as well. Both officers testified that rounds were fired from the house, nearly striking them. Gary Goodman yelled at them, admitting the shooting, and threatening to shoot the officers, as well. SWAT was called.

Between 3 and 4 a.m. the next morning, one of the SWAT officers saw Goodman "running toward him from the house," and that Goodman "pointed his fingers at him in gun-like fashion and said, 'boom boom boom.'" Goodman was arrested.

Following a search, the officers found about 50 guns, ammunition, and a variety of related items. Goodman was hospitalized. He never denied either his wife's murder or his attempt to shoot the officers. His defense was that he had no memory of the details of the shooting, and that he was disturbed by seeing his wife with Morgan. The Court allowed the jury to be instructed on extreme emotional disturbance (EED) and First-Degree Manslaughter, with seeing his wife with Morgan as the triggering event, with respect to Paula Goodman's murder, but not with the attempted murder of the police officers. (The Court ruled that the lapse of some 10-15 minutes between the two incidents negated any EED in the shootings involving the officers at his home.)

Goodman was convicted of murder, attempted murder and related offenses. He appealed the trial courts' denial of his request to instruct the jury on EED with respect to the Attempted Murder charges involving the officers.

ISSUE: Must oral statements made by the suspect/defendant be recorded in some way, and provided to the defense during discovery?

HOLDING: Yes

DISCUSSION: The Court reviewed the history of EED, and noted that "the EED trigger may be a gradual series of events, rather than a single intense one, and does not have to be contemporaneous with the resulting EED." (The "concept of adequate provocation is broad enough to include the cumulative impact of a series of related events.") However, the Court agreed that the trial court "did have a rationale for refusing to instruct on extreme emotional disturbance in the attempted murder charges." Despite the short lapse in time between the two incidents, the trial "court reasoned that the disturbed state of mind that could have existed when [Goodman] saw his wife and her lover together did not extend to his fleeing to another location or the deliberate actions he took towards the stand-off with the officers." The Court further noted that since the jury obviously did not accept his claim of EED in Paula Goodman's murder, when it was offered to the jury via instructions, there could have been no EED in the later incident, either.

Goodman also challenged a statement he made in the presence of an officer. The officer was standing in the doorway of Goodman's hospital room when "he heard someone ask Goodman how he felt that day." Goodman had responded "she deserved what she got" and "I killed the fucking bitch." (The later statement had been provided in discovery, but not the former.) Kentucky Criminal Rules of Procedure required that "upon written request by the defense, the attorney for the Commonwealth shall disclose the substance, including time, date, and place, of any oral incriminating statement known by the attorney for the Commonwealth to have been made by a defendant to any witness."[10] The officer agreed, under cross, that he had not written down the statement and that he had given inconsistent information regarding the statement to the investigating detective.

The Court, however, ruled that the statement was similar to others that had been properly admitted. Although the statement should have been provided to the defense, the Court found that the error in not doing so did not have a reasonable possibility of affecting the ultimate verdict, given the cumulative evidence against Goodman.

Finally, the court quickly discarded Goodman's claim that he should have received an instruction on Wanton Endangerment with respect to his attempted murder of the four officers, given that the evidence, including his verbal statements, clearly indicated he was attempting to kill one or more of the officers. The Court also found it appropriate to introduce evidence of the large number of weapons found at the house.

Goodman's convictions were upheld.

Murphy v. Com.
2008 WL 1850626 (Ky. 2008)

FACTS: On July 14, 2004, Jane Doe was working at a video store in Russell. A man entered the store and eventually headed toward the employee-only area, and Doe told him he was not permitted there. He cursed her and left, and Doe continued with her duties.

A short time later, another man came in and attempted to rent a movie; Doe told him he would first have to sign up for a membership. The man, Dixon gave her his operator's license, and she entered in his data. Dixon left, but indicated he would be back shortly to select another movie. Doe again resumed her duties.

Doe heard the "scuffling of boots across the floor." She was struck in the back of the head and dragged to the rear of the store by Dixon and the man who had first entered, later identified as Murphy. Murphy beat Doe and demanded she open the safe, and further physically abused her when "she told him there was no money in the store's safe because she had just made a bank deposit." Murphy saw a photo of Doe's son and threatened to kill the boy if she didn't open the safe. He demanded a ring she was wearing, and Murphy threw it at him, and attempted to escape by climbing the shelves and getting into the ceiling. Murphy caught her, dragged her to a back

[10] RCr 7.24.

room and violently raped Doe while beating her in the head with a hammer. Eventually, the two men left.

Another customer found Doe nude and bleeding from her head wounds. Doe's injuries were near-fatal. Det. Wilson (Russell PD) later testified that Dixon was an immediate suspect "because his personal information was still on the video store's computer when police arrived." He was arrested, and implicated Murphy, who was arrested two days later.

Murphy was eventually convicted of rape, assault and robbery. He appealed.

ISSUE: May a test for blood on an item of clothing be admitted, even if the source is too little to test for DNA?

HOLDING: Yes

DISCUSSION: Murphy first objected to the admissibility of hair and blood test evidence. The court found that the hair test, which indicated that Murphy could not be excluded as the source, while not conclusive of guilt was "relevant circumstantial evidence.' Further, the Court agreed it was appropriate for the technician to testify as to the presence of blood on Murphy's shoe, although the amount was too small for DNA testing.

Murphy's conviction was upheld.

Clay v. Com.
2008 WL 2167892 (Ky. 2008)

FACTS: During a Greenup County trial, the husband of one of the suspects, who was also a victim in the crime, was a hostile witness for the prosecution. During the direct, the husband, Don Clay, denied having told the police that he believed his wife (Beverly Clay, the appellant) was involved in her lover's (Cynthia Rusk) shooting of him. (Cynthia had already pled guilty, but implicated Clay as well, claiming it was done to get Don's insurance money.)

The prosecution then sought to impeach Don Clay with statements he made to Sheriff Cooper and Deputy McCarty, which the Court permitted, that implicated Beverly in both the shooting and a prior burglary of his home. Ultimately, Beverly Clay was convicted, and appealed.

ISSUE: May a lay witness's opinion on an ultimate issue in a trial be admitted?

HOLDING: Yes

DISCUSSION: Clay argued that Don Clay's statement was improperly admitted, in that it allowed Don Clay, in effect, to give his opinion on an ultimate matter – Beverly Clay's guilt. The Court found that the information was relevant, to explain Don Clay's "unexplained bias at the time of the trial." The Court agreed that it was "permissible for [the two deputies] to testify as to Don's belief that [Beverly Clay] was involved in the shooting."

The Court upheld the admission of the statement, and ultimately, Beverly Clay's conviction.

EVIDENCE AND TRIAL PROCEDURE - CRAWFORD

McIntosh v. Com.
2008 WL 2167894 (Ky. 2008)

FACTS: In Bowling Green, on Feb. 4, 2005, "Banks borrowed his girlfriend's car and led Slaughter and McIntosh to a parking lot not far from the bank [they eventually robbed] where they left their car." Banks took them to the bank and after he checked inside, he "signaled them to proceed." Banks then went next door, to a pharmacy. According to the bank surveillance photos, the pair "wore hoods, masks and gloves." McIntosh displayed what was later found to be a BB gun, and had the tellers open their money drawers, while Slaughter loaded the money into a bag. They ran from the bank to a family member's home, "stripping their disguises on the way." They met with Banks, who drove them to his girlfriend's house. The original plan was for the girlfriend to drive the pair to Indianapolis, but the girlfriend backed out. The next day, they went to Indianapolis on their own.

However, "[a]s it happened, the [pharmacy] security cameras caught Banks behaving suspiciously at just the time of the robbery, which led Bowling Green detectives to question him." He implicated Slaughter and McIntosh. Further investigation led the officers to the pair, and they were arrested. A search of the motel room where McIntosh was found produced a BB gun that resembled a handgun, marijuana and receipts from other purchases. Both were charged with bank robbery.

At the trial, the bank employee testified that the "robbers had taken a large number of two-dollar bills and that that evening McIntosh and Slaughter had given a large number of such bills to one of McIntosh's relatives." The primary witnesses against McIntosh, however, were Slaughter and Banks, with Slaughter's testimony "particularly damning." (Slaughter was 20, and McIntosh 40, with the gist of her testimony that she was manipulated by McIntosh into committing the crime.) Banks, who had already pled guilty in his involvement, also testified, but denied "any recollection of the bank robbery whatsoever." The prosecution used that denial to introduce Banks' prior statements "by asking him if he had not told [the police] a series of details about the robbery." He then claimed to have no memory of the police interviews either. He then pled the Fifth – but the Court "told him he had waived his Fifth Amendment right by pleading guilty and ordered him to respond." Banks then "reverted back to his lack of recollection, although he did at one point deny ever having told anyone that he served as a lookout for the robbers."

"Having lad a foundation, the Commonwealth moved to play for the jury two video recordings of Banks being interrogated by the police, on the ground that Banks's prior police statements were inconsistent, for the purposes of KRE 801A(a)(1), with his non-responsive testimony." The Court permitted the evidence over McIntosh's counsel's objections. The recordings substantiated Slaughter's testimony. In cross-examination, he was "no more responsive" and denied even knowing Slaughter.

McIntosh was convicted, and appealed.

ISSUE: Is an evasive witness "unavailable to testify" under Crawford?

HOLDING: No

DISCUSSION: McIntosh argued that "Banks's unresponsiveness rendered him essential unavailable for cross-examination and that his hearsay statements to the police were thus introduced in violation of the Sixth Amendment…."[11]

The Court agreed that Banks's statements to the police were testimonial, under Crawford. However, the Court disagreed that Banks's evasiveness did not equate to a testimonial privilege not to testify, but instead, stated "a witness's inability of refusal to recall the events recorded in a prior statement or the events surrounding the making of the statement does not implicate the Confrontation Clause."[12] Other cases had held that a witness that "willingly takes the stand, answers questions in whatever manner, and exposes his demeanor to the jury, thus giving the defense an opportunity to address the witness's prior testimonial statements" is not "unavailable for cross examination." Specifically, the court noted that Crawford did not overrule earlier cases on the issue, and concluded that he legally "appeared for cross-examination." The Court held that the introduction of the recordings was valid.

McIntosh also argued that the search warrant for his motel room was based upon stale information. Although passage of time may render information too stale to serve as a basis for a valid warrant. The warrant affidavit was presented to a judge exactly one month following the robbery and cited events that had occurred in the interim, including a cash purchase of a used vehicle, and the nightly cash payments for the motel itself. The items sought were items that could have been disposed of, but which would have "continuing utility" for criminals – the masks and the gun, in particular. As such, it was "fairly probable" that some of the items, and the proceeds of the robbery, "would have been retained after the crime and would be found in the motel room." The Court further upheld the evidence located in the motel room.

McIntosh's conviction was upheld.

Allen v. Com.
2008 WL 2484952 (Ky. 2008)

FACTS: Allen was charged in Letcher County in the death of a foster child, Dakota. When the child arrived at the hospital, Dakota was unresponsive and had bruising around his neck. At trial, recordings of five "non-emergency 911 phone calls" were introduced.

Specifically, the fourth call was made following Dakota's death at the hospital by a nurse, "indicating her suspicion that [Allen] was involved in Dakota's death." She detailed "Dakota's bruising around the neck, speculates that the story which [Allen] was giving did not 'fit,' and adds that she [did] not think that a four-year-old could do that (meaning cause the injuries). (Dakota's older biological sibling supposedly killed the child.) As a result of the call, an investigator was dispatched.

[11] Crawford v. Washington, 541 U.S. 36 (2004).
[12] U.S. v. Owens, 484 U.S. 554 (1988).

In the fifth call, "a caller, identifying himself only as from the Whitesburg Police Department, has a conversation with the 911 operator involving several testimonial hearsay and double hearsay statements." The caller gave "statements as to what other officers ha[d] told him and as to what a janitor told an officer, who then, in turn, told the caller." Specifically, he stated that "it was the foster parents.'" The caller stated that "the family members had previously been rowdy and upset" and that a state trooper had been called to investigate the situation. The caller also stated that "the child had bruises all over his body and that nurses had examined the body more closely and found additional bruising," including "handprints around the neck, bruises on the inner thigh, and a black eye." The caller did not testify.

Allen was convicted of Wanton Murder, and appealed.

ISSUE: Are phone calls (in which the caller does not testify) inadmissible under Crawford, if they are not made during an ongoing emergency?

HOLDING: Yes

DISCUSSION: The Court reviewed Crawford v. Washington, Davis v. Washington and Heard.[13] The Court found that the fifth call was "precisely the type of non-emergency, testimonial statements warned against" by the U.S. Supreme Court. The "information was not necessary to resolve the present emergency, but rather to simply learn what had happened in the past." In this case, the "trial court failed to recognize when the calls to 911 ceased to address an ongoing emergency situation and instead became testimonial statements." With respect to the fourth call, while it was testimonial, the nurse who made the call did testify. As such, although it was hearsay that should not have been admitted (nor should it have even been necessary), its admission did not violate Crawford.

The Court found that both calls, however, singly and together, were not harmless and did, likely, prejudice the overall case. The information presented in the two calls was not just cumulative, it served to "pile on" against Allen.

Allen also claimed that certain hearsay statements that favored his version of the facts should have been admitted as "excited utterances." Specifically, the biological mother of the foster children told Allen and his wife that she knew that "they could not have hurt her baby" and that she'd also had to separate the two children the prior week. The Court noted that there was no evidence as to "how much time passed between [the mother] learning of her child's death and when she made the statement." The Court noted that it was "apparent that the statement was one of consolation, which is typically the fruit of deliberation" – and therefore not admissible as an excited utterance.

Allen's conviction was reversed and remanded for a new trial.

[13] Heard v. Com., 217 S.W.3d 240 (Ky. 2007).

EVIDENCE/TRIAL PROCEDURE - CONSTRUCTIVE POSSESSION

Okorley v. Com.
2008 WL 2468862 (Ky. App. 2008)

FACTS: On Nov. 23, 2005, Officer Rhea (Lexington PD) stopped a vehicle driven by Penman for running a stop sign. Okorley was the front seat passenger, and Richardson and Rogers were in the back seat. Officer Rhea noted that all "looked nervous and were all making movements." She discovered that Penman had an outstanding arrest warrant, removed everyone from the car, and searched it incident to arrest. She found a joint in the back ashtray and 4.8 grams of marijuana hidden under that ashtray. Okorley admitted ownership of the marijuana, even though he couldn't, apparently, state where the officer had actually found the marijuana. He then denied ownership, and Officer Rhea arrested all of the occupants because they all had "easy access to it based upon their respective locations in the car."

During the trip to the jail, Officer Rhea noticed Orkorley's movements in the car and thought he had something on his person. She authorized a strip search, and prior to the search, Okorley stated he had illegal drugs on his person. A search revealed a quantity of crack cocaine and cash. He was indicted on Possession of marijuana and Trafficking in cocaine. He requested suppression, arguing that he "did not have easy access to the drugs," which were "located in the back of the center console, which was not accessible to him due to his location in the front seat and the large size of the driver." The trial court denied the motion. Okorley took a conditional guilty plea, and appealed.

ISSUE: May passengers be charged for drugs found in a vehicle they occupy?

HOLDING: Yes

DISCUSSION: Okorley argued that the "search conducted on him" lacked probable cause. The Court looked to Maryland v. Pringle and Burnett v. Com.[14], each of which involved passengers. The Court noted that "[t]o prove constructive possession, the Commonwealth must present evidence which establishes that the contraband was subject to the defendant's dominion and control." In the more recent case of Com. v. Mobley,[15] the Court found a conviction for a passenger for accessible unclaimed drugs was appropriate. The drugs in the Penman's car were located in an area that was "centrally accessible to at least the three passengers, including Okorley." As such, all three passengers had constructive possession. Further, Okorley's movements in the vehicle justified the more detailed search at the jail.

Orkorley's conviction was upheld.

[14] 31 S.W.3d 878 (Ky. 2000).
[15] 160 S.W. 3d 783 (Ky. 2005).

Parker v. Com.
2008 WL 1837321 (Ky. App. 2008)

FACTS: On June 29, 2004, Trooper Bowles (KSP) "was dispatched to a residential area shortly after midnight … to investigate a report of a strong chemical odor." He arrived and discover the odor, which "he described as a combination of anhydrous ammonia and ether." The two sources of the odor were an outbuilding, some 75 feet from the Miller home, and a rolling trash can, in which he found a Coleman fuel container and several starter fluid can. The troopers approached the home, finding the lights on, but no one answered their knock. A note on the front door directed visitors to a side door.

A trooper certified in lab response confirmed that the odor indicated a methamphetamine lab. They entered the outbuilding and "discovered a recently active methamphetamine production lab." They secured the scene and requested a warrant for the residence. A vehicle "normally driven by Parker drove past the residence pulling a lawn mower on a trailer" but did not stop. Officers stopped the vehicle about a half mile away and found Parker driving and Miller as passenger. They returned the two to the residence and informed them of the search warrant. Miller produced a key to the house and when they entered, the officer discovered a video security system focused on the driveway, as well as methamphetamine and paraphernalia.

Miller also stated that the lights had been off when they left and also that the outbuilding contained various legal items.

Both were arrested, and Parker was convicted of manufacturing methamphetamine and related charges. She appealed.

ISSUE: Is possession of keys to a locked building sufficient to demonstrate constructive possession?

HOLDING: Yes

DISCUSSION: Among other issues, Parker argued that she was not in possession of the lab. The Court, however, quickly agreed that possession did not require "actual physical possession" but instead could be established by showing that the "contraband involved was subject to [her] dominion and control." In this case, given her possession of keys to the location where the lab was located, was sufficient to conclude that she had both "knowledge and construction possession of the lab…."

The Court also agreed that it was not double jeopardy to convict her of both manufacturing methamphetamine and possession of anhydrous ammonia in an improper container" as "[p]ossession of each of these items constituted a distinct violation of a statute."

Parker's conviction was upheld.

Sanders (Juan & Cecilia) v. Com.
2008 WL 2219789 (Ky. App. 2008)

FACTS: In the morning of Oct. 29, 2002, Juan Sanders was arrested leaving 3902 Vantage Place, in Louisville. Juan was out on bond pending his appeal for a manslaughter conviction and Vantage Place was his listed address. A few months earlier, however, his bond had been revoked, and warrants issued, but two other addresses were listed. He was also a suspect in a shooting that had occurred on Oct. 28. That morning, having been informed of a CI of his location, the police began surveillance of the Vantage Place address.

During the same time frame, however, another officer, investigating the shooting the day before, was working on a search warrant for the address. That officer received the warrant and the Vantage Place residence was searched, but no evidence was found concerning the shooting. However, they "discovered sixty-five marijuana plants and related paraphernalia." They obtained a second warrant (different judge) to continue to search for drug evidence in the house and the vehicle outside.

Both Juan and Cecilia Sanders were indicted on Trafficking marijuana and related charges. Juan requested suppression of the evidence found in the vehicle, while Cecilia requested suppression of all of the evidence. Both were denied, with the Court finding probable cause for both warrants.

The Sanders were tried together, and both were convicted. Both appealed.

ISSUE: Is one's presence, along with personal belongings, in a residence sufficient to prove constructive possession?

HOLDING: Yes

DISCUSSION: The Court reviewed what had been documented in prior hearings.

> Juan had a valid warrant issued for his arrest, which had been issued when his appeal bond was revoked after his manslaughter conviction was affirmed." A confidential informant informed the police that Juan could be located at the Vantage Place residence and the police corroborated this information with extensive surveillance. An officer acquired a valid search warrant based on the warrant relating to Juan's previous conviction, information from the confidential informant, police surveillance, and Juan's status as a suspect in a separate shooting incident." Juan contended, however, that the residence belonged to his estranged wife, and "thus he was not in constructive possession of the marijuana." Looking at each warrant in isolation, the Court found that there was sufficient probable cause to believe that Juan might be found at the Vantage Place address, even though it was based upon an anonymous tipster. In this case, "the confidential informant's tip was verified by lengthy police surveillance which confirmed that Juan was at the residence." Since the second warrant was based upon legal observations made during the execution of the first warrant, it too was lawful.

With respect to Juan's argument concerning constructive possession, the Court noted that "Juan's clothes, various bills and correspondence addressed to him, and a "grow lamp" displaying both Juan and Cecilia's names were found in the Vantage Place residence." During the surveillance, he appeared to be alone in the house, demonstrating that "he had control and dominion over the items in the house." As such, it was proper to find he had constructive possession of the marijuana.

Both convictions were affirmed.

Turner v. Com.
2008 WL 2152264 (Ky. App. 2008)

FACTS: On November 4, 2003, Deputy Sgt. Parks (McCracken County SO) responded to a complaint of suspicious activity at Turner's residence. He spotted three men carrying duffel bags, two of whom fled. The man who did not flee identified Turner as one of the other men that night. The deputy got a search warrant and evidence was recovered. Turner was charged with a variety of methamphetamine related charges, and during his trial, he absconded. He was convicted, however, and appealed.

ISSUE: May an officer testify concerning OSHA regulations?

HOLDING: Yes

DISCUSSION: Among a variety of issues, Turner argued that it was inappropriate for the prosecution to question Captain Hayden "about OSHA regulations regarding approved containers for anhydrous ammonia." KRS 250.482(4) defines an approved container as those that meeting the requirements of federal law for such containers. Captain Hayden had testified that a fire extinguisher containing anhydrous ammonia found at Turner's home was not an approved container. As a result of a challenge, the federal regulations themselves were admitted, and the appellate court agreed they were admissible.

Turner also argued that "Sgt. Parks impermissibly invaded the curtilage of his property when he encountered the three men." Sgt. Parks had actually testified that he "walked behind the trailer next door to Turner's home in order to observe what was going on" and approached only when he realized they were leaving. The Court agreed that the trial court's decision that "Turner did not have a privacy interest in the adjoining property and Sgt. Parks had a right to be there."

Turner's conviction was affirmed.

EVIDENCE/TRIAL PROCEDURE – POLICE JUROR

Shane v. Com.
243 S.W.3d 336 (Ky. 2008)

FACT: Shane was scheduled to stand trial on multiple criminal charges. One of the jurors in the jury pool, it turned out, was currently a Louisville Metro police officer, but he had not been an officer at the time of the original crime. He did, however, work for the same agency and knew and had worked with the two detectives in the case. He stated in voir dire that he could be impartial, but agreed that the was "absolutely pro-police," and believed that officers would not lie under oath. The Court did not permit a strike for cause, and eventually, Shane used one of his peremptory challenges to exclude the officer.

Shane was ultimately convicted, and appealed.

ISSUE: Must a juror who professes bias in favor of police be excused?

HOLDING: Yes

DISCUSSION: The Court noted that the law requires that a judge must excuse a juror "if there is a reasonable basis to believe the juror cannot be fair and impartial." The juror's responses, taken in their entirety, clearly "indicated a probability that he could not enter the trial giving both sides a level playing field." As such, the judge should have excused the juror for cause. By not doing so, Shane lost a peremptory challenge that could have been used to strike another juror. The Court found the error substantial and that Shane "did not get the trial he was entitled to get." The case was reversed and remanded for a new trial.

EVIDENCE / TRIAL PROCEDURE - CITATION

Towery v. Com.
(2008 WL 1917754) Ky. App. 2008

FACTS: On May 25, 2005, Towery was driving his girlfriend's car (with her in the vehicle) when he was stopped for failure to use a turn signal. He was charged with DUI and driving on a suspended license. When the vehicle was searched, methamphetamine, marijuana and drug paraphernalia was found, along with a loaded gun. Towery admitted the gun was his, but not the drugs. He was indicted on a number of charges, including possession of the gun, since he was a convicted felon. He requested suppression and took a conditional guilty plea. He then appealed.

ISSUE: May evidence that Miranda was given, indicated on a citation by a non-testifying officer, be proof that Miranda was, in fact, given?

HOLDING: Yes

DISUCSSION: Towery first argued that his statement to police should have been suppressed because he was not given his Miranda warnings. The officer who testified agreed he did not "talk

much to Towery at the scene and that he could not remember exactly what was discussed" but "speculated that it was a general traffic stop conversation." He did not recall giving Miranda, but also testified that he did not interview Towery. The Court reviewed other evidence in the case, including a citation entered in the record that indicated a non-testifying officer gave Miranda, and denied the suppression. The Court looked to Com. v. Priddy,[16] which stated that it was appropriate for the trial court to consider "comments directly from the citation" in a suppression hearing. The Court found that it was not error to accept the citation as evidence that Miranda had been given.

Next, Towery argued that he was not a felon at the time of the offense. He had been charged and pled guilty, but not yet sentenced for the previous felony, when he was stopped. The Court concluded that once the plea has been made, the individual becomes a convicted felon.

Towery's plea was upheld.

Shepherd v. Com.
251 S.W.3d 309 (Ky. 2008

FACTS: Shepherd (16), Miller (16) and Cook (17), were "hanging out" together in Lexington, "drinking and smoking marijuana." Miller and Shepherd decided to find someone to rob. Miller went to his apartment and got a revolver and Shepherd got a belt and strapped on the holster and gun. (Cook later testified that Shepherd had the gun.) The three walked around until they found Liebengood unloading groceries. "They sneaked up on Liebengood, and Shepherd ordered her to give him her money." She told him she had no money, and Shepherd took her purse from the car. He then ordered her to hand over her car keys and get into the trunk, and she refused. Shepherd struck her and she fell to the ground. (At this point, Cook later testified he started to walk away, fearing "things were getting out of hand.") Shepherd stood over Liebengood, asked if he should shoot her, and then shot her. Cook ran back toward his apartment, which he shared with Miller, and Shepherd and Miller also fled the scene.

Epps, who was Cook's cousin and the mother of Miller's child, was at the apartment when Miller returned. She testified the Miller was upset and told her that Shepherd was "crazy." Miller had the purse, and Epps tried to help get rid of it by throwing it across the fence. Shepherd also returned, wiping the holster, and "kept saying, 'I killed that white bitch.'"

Shepherd was arrested the next day. He initially denied the crime and blamed it on someone else. He then confessed that he was involved, and that he and Cook tried to put the victim in her trunk but he claimed the Miller actually shot her. He stated that he threw the gun and the car keys into a dumpster.

Cook and Miller were arrested the next day. All three were indicted for murder and first-degree robbery. Cook pleaded guilty to robbery and agreed to testify, naming Shepherd as the actual shooter. "At trial, the Commonwealth introduced the statements Miller and Shepherd had given to the police shortly after the offense, each of which was redacted to eliminate any reference to the

[16] 184 S.W.3d 501 (Ky. 2005).

other defendant." However, in their "respective closing arguments, each defendant admitted to being present during the robbery, but contended that his co-defendant committed the murder."

Shepherd was convicted of murder, and Miller of complicity to the murder and robbery. Shepherd appealed.

ISSUE: May an officer's testimony regarding prior contacts with a defendant endanger the case?

HOLDING: Yes

DISCUSSON: Shepherd argued that he should have been given a separate trial, and that he was "unduly prejudiced by the joint trial because Miller's redacted statement expressly implicated him as the shooter." The Court looked to Bruton v. U.S. which found that "the use of a non-testifying co-defendant's confession that 'expressly implicated' the other defendant constitutes a violation of the Confrontation of the Sixth Amendment."[17] As an extension of the Bruton rule, the court had also found that "redacted confessions which merely delete the name of the other defendant or insert the phrase 'other party' or 'deleted' also constitute a Bruton violation because the statements still facially incriminate the co-defendant." [18] In this case, although what was admitted does not name Shepherd, it does, "however, link Shepherd to the murder when it is heard in light of the other evidence introduced against Shepherd at trial."

In this case, the Court stated that the U.S. Supreme Court had "addressed this type of redacted confession, and had held "that when the defendant is 'linked to the confession by evidence properly admitted against him at trial,' there is no Confrontation Clause violation if the confession is redacted to eliminate all references to the defendant's existence."[19] Because the redacted statement "never referred to Shepherd and only incriminated him when viewed in light of the other evidence," the Court found no Bruton violation.

Another claimed error involved the testimony of one of Shepherd's arresting officers. The officer, in response to a question by the prosecutor, gave a lengthy narrative which included "several prejudicial remarks, including that his unit was originally dispatched to Ashford Place Apartments for a narcotics complaint, in which one of the subjects of the complaint was Michael Shepherd; he recognized Shepherd through other contact he had had with him; and he thought Shepherd might be a flight risk because he had previous run from officers." He further described an instance in which Shepherd had run from an arrest. Following the testimony, Shepherd's counsel objected and moved for a mistrial, but instead, the judge offered to admonish the jury. Shepherd's counsel noted that an admonition would only spotlight the statements, but did accept an admonishment of the witness outside the presence of the jury. Shepherd argued that he was entitled to a mistrial, but the Court agreed with the trial court that the evidence given by the officer "was not devastatingly prejudicial" and did not make the trial unfair, although it was improper.

[17] 391 U.S. 123 (1968).
[18] Barth v. Com., 80 S.W.3d 390 (Ky. 2001).
[19] See Richardson v. Marsh, 481 U.S. 200 (1987).

Shepherd also argued that a technical violation of KRS 610.220(2) made his confession inadmissible. Although the facts differed, Shepherd may have arrived at the police station as early as 5:26 p.m., and the CDW was initially contacted at 8:06. The CDW granted an extension to Shepherd's time in custody, apparently of 2 hours, and the CDW was further contacted at 9:54 to extend that time for an additional half-hour to permit Shepherd to be photographed and fingerprinted. When the half-hour had passed, Shepherd's mother had arrived and spoken to her son, and Shepherd was eventually transported to the juvenile facility.

The Court agreed that although "police officers' failure to comply with these protective statutes is a serious infringement, the violation by itself does not necessary justify suppressing the confession." In this case, "although the police officers may have been tardy in complying with the statute's two-hour requirement, they did not disregard the statute nor did they greatly exceed the statutory time limit." During that time, Shepherd had been given his Miranda warnings, and there was no indication he did not understand them. The Court found his statements to be voluntary and properly admitted.

Another issue involved a statement taken from McCann, Shepherd's cousin who lived with him. In that statement, he implicated Shepherd. However, "McCann's testimony at trial was either very different from this interview or he could not recall what he had told the police originally, prompting the trial court to make a finding that McCann was evasive and hostile." The prosecution was allowed "to play the portions of McCann's recorded police interview that were inconsistent with his trial testimony on direct examination," after it was authenticated by the detective that taped it. The Court found that since a proper foundation had been laid, and since there was ample opportunity to question McCann regarding the interview, its admission was appropriate.

Finally, after the trial, the defense learned of an interview between the police and another individual, Jones. Shepherd moved for a new trial, basing his claim on an assertion that the interview was exculpatory. However, the Court found that the interview was "rambling, inconsistent, confusing, and practically worthless for an substantial use in this case," and agreed it was not material to the case. In fact, upon review, the Court noted that much of it was actually very damaging to Shepherd, and the only helpful part was cumulative to evidence that had been submitted, the Court upheld the trial court's decision not to reopen the case.

Shepherd's conviction was upheld.

Chestnut v. Com.
250 S.W.3d 288 (Ky. 2008)

FACTS: On Aug. 18, 2004, a "series of burglaries were committed on Mt. Rainier Drive in Jefferson County." Officers were dispatched on a burglary in progress. Officer Ebersol "noticed a gray Chevrolet parked outside of the residence from which the call had been made" – which then "sped away." Ebersol chased and caught the vehicle, which was driven by Chestnut.

Chestnut told the officer "that he was lost and had turned around in the subdivision." A show-up, however, with the resident and another officer resulted in the identification of Chestnut as the burglar. Both Chestnut and his estranged wife were ultimately charged with a number of burglaries in the area. Chestnut was convicted and appealed.

ISSUE: Must incriminating oral statements, made to officers, be disclosed during discovery?

HOLDING: Yes

DISCUSSION: Ebersol testified to the show-up, and how Chestnut was arrested as a result of the identification. (The Court had already agreed that the homeowner's actual statements were hearsay and would not be admitted.) The Court agreed that "investigative hearsay is still, fundamentally, hearsay and, thus, disallowed" – but noted that "not all testimony from a police officer concerning an investigation is hearsay." The rule in Sanborn v. Com. indicated that "a police officer may testify about information furnished to him only where it tends to explain the action that was taken by the police officer as a result of this information *and* the taking of that action is an issue in the case." [20] Sanborn, however, "places a short leash on the extent to which investigative hearsay, or as more appropriately styled, investigative verbal acts, may be used." Such testimony is only admissible when "the taking of action by the police is an issue in the case and where it tends to explain the action that was taken as a result of the hearsay information." In this case, it was important to show how Chestnut was developed, and identified, as a suspect. Notably, the Court stated that the "testimony was not offered to prove the truth of what Boldrick told the officers," but instead "was offered to prove the officers' motive for arresting [Chestnut]." As such, the testimony was properly admitted.

Chestnut also argued that certain information presented during Det. Wright's testimony was never disclosed to him prior to trial, as required. Specifically, Det. Wright testified that, during an oral interview, Chestnut admitted "that he waited outside as his wife burglarized homes." This was never shared with defense counsel. The Court noted that, in the past, it had held that the first part of RCr 7.24(1)[21] only applied to written or recorded oral statements. However, after much consideration, the Court found that the rule "was intended to apply to both oral and written statements, which were incriminating at the time they were made."

The Court ruled that "nondisclosure of a defendant's incriminating oral statement by the Commonwealth during discovery constitutes a violation of the discovery rules … since it was plainly incriminating at the time it was made." This created the "potential for the late introduction of evidence which is then destructive of the credibility of the entire defense." The Court found that the failure to disclose the statement in discovery gutted Chestnut's defense.

Chestnut's conviction was reversed, and the case remanded for a new trial.

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[20] 754 S.W.2d 534 (Ky. 1988).

[21] RCr 7.24 Discovery and inspection

(1) Upon written request by the defense, the attorney for the Commonwealth shall disclose the substance of any oral incriminating statement known by the attorney for the Commonwealth to have been made by a defendant to any witness, and to permit the defendant to inspect and copy or photograph any relevant (a) written or recorded statements or confessions made by the defendant, or copies thereof, that are known by the attorney for the Commonwealth to be in the possession, custody, or control of the Commonwealth, and (b) results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case, or copies thereof, that are known by the attorney for the Commonwealth to be in the possession, custody or control of the Commonwealth.

Wilson v. Com.
2008 WL 2312731 (Ky. App. 2008)

FACTS: Wilson was convicted of second degree burglary at the home of Webb and Herron. The home had been "subjected to a forcible entry and the contents of a bedroom had been disturbed." There was no evidence of theft, however. A witness, Cook, testified that he saw a white Taurus, which turned out to belong to Wilson's mother, leaving the house. Upon checking, Cook found the front door locked and the side door forced open. Herron later testified that Wilson did not have a right to be at the house – although Wilson later claimed to have gone there with her mother to check on Webb, who'd had surgery the day before, and to have returned later, alone, at her mother's request, when they'd discovered Webb wasn't home. She indicated she'd run into Cook at the house and then left, and denied she'd ever entered the bedroom.

There was evidence that "Wilson and Webb were family friends and that she had been over to his residence numerous times in the past." She claimed that she had permission to be in the house when Webb wasn't there, and "that no one had ever told her otherwise."

Wilson was convicted, and appealed.

ISSUE: Are prior consistent statements made by testifying witnesses admissible in court?

HOLDING: No (usually)

DISCUSSION: The Court noted that Olze (another witness) and Herron had given written statements that were consistent with what they said in court. Deputy Knight testified that Webb had dictated a statement to Herron, because he could not write – but this statement had been ruled hearsay and inadmissible. Wilson argued that the statement should have been admitted as it was favorable to her. Deputy Knight did read Wilson's statement to the jury.

The Court discussed the issue of "prior consistent statements." Deputy Knight had testified that Webb's and Herron's statements were "consistent with their testimony in court." The Court found that the "deputy's testimony that the prior statements were consistent with those given at trial was highly prejudicial in that it only served to bolster the Commonwealth's witnesses…." Further, the Court found that the "implication was that Webb's inadmissible statement also corroborated the statements of Herron" and another witness, Olze. The Court found that to be reversible error.

Wilson's case was reversed and remanded for further proceedings.

Armstrong/Ellis v. Com.
2008 WL 1090901 (Ky. App. 2008)

FACTS: On Nov. 18, 2005, Ellis was charged with attempted voyeurism and disorderly conduct. On the day of the offense, two women were using the restroom in a gas station, owned by Ellis, when one of them "observed a movement behind a mirror hanging above a sink." They contacted the police, who arrived and observed the same movement. The officers "immediately entered an adjacent room marked [as an office,] where they found Ellis and a two-way mirror that accessed a view into the ladies' restroom." Ellis was arrested.

Ellis moved to have the disorderly conduct charge dismissed, arguing that his actions simply didn't fit the elements of "physically offensive." The trial court agreed and dismissed the charge prior to trial and without the agreement of the prosecution. The Commonwealth petitioned for a reversal of that decision to the Anderson Circuit Court, and that court agreed, issuing a writ of prohibition and mandamus. The Court ruled that "district court judges do not have the power to dismiss a criminal charge prior to trial without the Commonwealth's permission." Judge Armstrong and Ellis appealed.

ISSUE: May a trial judge dismiss a case without the agreement of the prosecution, outside of a trial?

HOLDING: No

DISCUSSION: The Court ruled that there was no other adequate remedy than the issuance of the writ, and that "an extreme showing of quasi-cataclysmic proportions is not an absolute prerequisite for the issuance of a writ." The Court further noted that this type of "writ is invoked when the administration of justice or the integrity of the law in general is being jeopardized by a particular court action as distinguished from a person, particularized interest of a petitioner."

Having concluded that both elements were satisfied for the writ, the Court found itself "persuaded that the district court clearly erred as a matter of law in dismissing the disorderly conduct charge against Ellis," in that it "lacked the authority to do so without the permission of the Commonwealth." (The trial court might, however, rule in favor of the defendant by using a directed verdict following the trial.)

The Anderson Circuit Court's decision was affirmed.

INTERROGATION

Alkabala-Sanchez v. Com
255 S.W.3d 916 (Ky. 2008)

FACTS: Trooper Devasher (KSP) developed Alkabala-Sanchez as a suspect in a multiple murder that occurred in Kentucky. With the assistance of local officers, he located Alkabala-Sanchez and asked him to come to the local police station to discuss the crime. Alkabala-Sanchez agreed, and was told he was free to leave at any time. He was permitted to move around the station, use the restroom, buy drinks and spend breaks as he wished. Prior to receiving Miranda warnings, he stated that another individual, Camacho, had killed the three men, but claimed he only learned of it after the fact. He also stated that Camacho "had told him to hide and not talk to the police."

It became obvious that Alkabala-Sanchez was actually involved in the homicides. In the early morning hours, he was given Miranda warnings, but he continued to talk to the officers for two hours. By the end of the interrogation, "he admitted to assisting with the planning of the murders and the disposal of the bodies." He was charged with murder and complicity, and waived

extradition to Kentucky. He requested suppression, and following a lengthy hearing, his request was denied. Although he argued that he was never given Miranda, that was apparently refuted by the translated transcript of the interrogation submitted as evidence. He noted that he "believe that the police had taken his sister in handcuffs to the police station," and that his uncle was also taken to the station; the evidence indicated that although she accompanied her brother, the sister was not in custody and was returned home. Also challenged were the abilities of the first translator, with another witness testifying as to the real meaning of Alkabala-Sanchez's words. Ultimately, the Court concluded that he was not in custody before Trooper Devasher gave him Miranda warnings, and that the translation was "sufficiently reliable."

When his suppression was denied, he took a conditional guilty plea to complicity to commit murder. He then appealed.

ISSUE: Is stopping a non-custodial questioning to give Miranda, when it becomes incriminating, improper?

HOLDING: No

DISCUSSION: The Court noted that the main question in this case was whether Alkabala-Sanchez was in custody "when he made statements in an interview with a Kentucky State Police officer in New Jersey." The Court followed the trail outlined by Trooper Devasher, detailing how each bit of evidence led him closer to Alkabala-Sanchez. In particular, the Court noted that Alkabala-Sanchez agreed to meet with the officers during a phone call, and "[h]e obviously did not have to be there, and could have refused to meet with the officers." Alkabala-Sanchez agreed to accompany them to the station, rather than continuing a discussion by the side of the road, their designated meeting place. The trial court, which had the benefit of the statement, found that Trooper Devasher told him he was free to leave, and it was clear Alkabala-Sanchez understood that. During the course of their lengthy discussion, Alkabala-Sanchez "began to talk too much, and to make statements not consistent with second-hand information." At that point, Trooper Devasher elected to give Miranda warnings, and the Court found the next two hours were a "custodial interrogation."

The Court further noted this was not the "question-first" process described in Missouri v. Seibert.[22] In this case, Alkabala-Sanchez "had been telling a story as if it were told to him by Camacho's wife, but interspersed statements that indicated personal knowledge." The Court found no indication that the interview was done in bad faith, and that Trooper Devasher "began the interview under the assumption that Alkabala-Sanchez was simply a witness with knowledge of the crime." When it evolved further, he gave Alkabala-Sanchez Miranda warnings.

Alkabala-Sanchez's conviction was affirmed.

[22] 542 U.S. 600 (2004).

Juarez v. Com.
2008 WL 2167887 (Ky. 2008)

FACTS: Juarez was arrested by Boone County officers for sexual offenses against three children. Juarez was a native Spanish speaker (Honduras) and his ability to speak English was disputed. He was interrogated and "made a number of highly incriminatory statements" – which resulted on multiple charges of Rape, Sodomy and Sexual Abuse, and related charges.

Juarez requested suppression, and was denied. He was eventually convicted on some, but not all, of the offenses. He appealed.

ISSUE: Must all interrogation stop when a suspect requests an attorney?

HOLDING: Yes

DISCUSSION: The Court addressed the interrogation that occurred between Juarez and the investigating detective, McVey. Juarez indicated that "he understood English 'so-so.'" No translator was provided, and Juarez was provided his Miranda warnings in English. During the discussion "Juarez mentioned that one of the alleged victims had raped him and words to the effect that he wanted to talk to a lawyer or judge." The investigator did not acknowledge that mention but did provide Juarez with a waiver of rights form. Juarez said he was willing to talk and was instructed to sign the form. He later made an "ambiguous statement that his lawyer 'is no way coming.'" Again, the officer did not acknowledge the statement and continued the investigation. Juarez responses to the questioning, in English, was in "halting and broken English." Det. Watson then took over, and Juarez "repeated his request for an attorney." Watson then stopped the interrogation and Juarez was placed in a holding cell.

McVey returned and asked Juarez if he had anything else to say, and Juarez said he did not. The Court noted that "[s]ince Juarez had already clearly invoked his right to counsel, McVey was not entitled to ask Juarez if he wanted to make any further statements." However, since Juarez made no statements, this was not an issue. As he was being taken to the jail, Juarez said he was sick, and McVey questioned him to clarify his complaint. Juarez was returned to the interview room and asked "if he wanted to talk further" and he agreed. He made "several incriminating statements" following questioning.

The Court reviewed the videotape of the interrogation, and found that despite Juarez's problems with English, his wavier was "knowing, voluntary and intelligent." The more difficult question, however, was "whether Juarez invoked his right to counsel early on during his interrogation by McVey." The Court found the initial "passing references to an attorney" was not an unequivocal indication of his right to an attorney. Juarez "clearly had a sufficient grasp of English unambiguously to invoke his right to counsel, as evidenced by his unambiguous requests for counsel during his questioning by Watson." When that occurred, questioning stopped.

The Court noted that once Juarez invoked his right to an attorney, he could only be interrogated again if he "himself initiates further communication, exchanges or conversations with the police."[23]

[23] Oregon v. Bradshaw, 462 U.S. 1039 (1983).

The videotape of the second session contained "no evidence of coercion or duress." The Court upheld the denial of his motion to suppress the statements.

Griggs v. Com.
2008 WL 1851080 (Ky. 2008)

FACTS: Griggs, who was married at the time, and the victim, Salyers, had a child together in 1989. They remained in contact, and although Griggs' marriage continued, he was still jealous of Salyers's relationships with other men. On June 12, 2005, the child, Nicole, was to go with Griggs for a month-long visit, but when he went to pick up Nicole, she and her mother were not there, having been delayed. A little later, Salyers dropped off Nicole at the Griggs's home. Later that night, however, Griggs went to Salyers's home, where they fought, and Griggs "killed her by shooting her twice in the head."

The next morning, Griggs took Nicole to summer school, then called his wife and asked her to pick up the child. When they arrived home, they found Griggs asleep. "When they tried to rouse him he was incoherent." Ambien (a prescription sleeping medication) was found nearby. When his incoherence persisted, his wife called for police and EMS. During the same time frame, a relative found Salyers's body. The relative called the Griggs's home, "apparently to accuse Griggs of the murder."

Griggs was taken to a Lexington ER. When he was roused by nurses, between 2 and 4 p.m., he was "responsive and coherent albeit lethargic and not aware of where he was." By about 3 p.m., uniformed officers were at the hospital, staying with him. The nurse asked Griggs what had happened, and he claimed to have taken Ambien and remembered nothing else.

At about 4:15, Det. Persley was interviewing Griggs. At a later suppression hearing, he testified that he had originally been dispatched to look into a "possible suicide attempt, but that en route to the hospital he was informed of Salyers's murder and of Griggs and Salyers's relationship." He stated that Griggs had been lethargic, but oriented, and he had "understood who the detectives were, and had responded appropriately and deliberated to all of their questions." He was given, and waived, his Miranda rights. Eventually, Griggs confessed to Salyers's murder, and stated that he'd disposed of the gun near Paris. Some minutes later, Det. Persley returned to ask a few more questions and provided Miranda warnings again. Griggs requested an attorney. When Griggs was released from the hospital a few hours later, he was formally arrested. He later testified that he had no recollection of anything up until the point he received the second set of Miranda warnings.

Griggs moved for suppression, claiming that his overdose/intoxication rendered his confession involuntary. The trial court, however, denied the motion, given that both the nurse and the detective had found him "appropriately responsive and coherent."

Griggs appealed.

ISSUE: Is a suspect who is in the hospital, but not under arrest or under guard, "in custody" for purposes of Miranda?

HOLDING: No

DISCUSSON: The Court found that Griggs did not claim that the "detectives overbore his will by the use of coercive tactics" and did not "threaten Griggs, make promises, humiliate him, prolong the questioning unduly, or subject him to any sort of physical deprivation." The Court found the confession to be voluntary.

Griggs also claimed that the officers gave him Miranda, but that they did not tell him "that anything he said could be used against him." The audio recording supported his claim. However, the trial court found that since he wasn't in custody at the time, Miranda rights had not yet attached. The Court agreed, finding that "the restraint giving rise to 'custody' must be restraint instigated by the police…." "The Court noted that "hospital questioning, like questioning elsewhere, is not custodial unless the circumstances would lead a reasonable person to believe that were he capable of leaving the hospital, the police would not allow him to do so."

After resolving several other issues, the Court affirmed Griggs's conviction.

Fugett v. Com.
250 S.W.3d 604 (Ky. 2008)

FACTS: On Jan. 26, 2006, Ray and Robbins went to a downtown Louisville, planning to buy marijuana. Robbins met Fugett and they agreed upon a sale, with Fugett going to call Robbins with a time and meeting place. Fields drove Fugett to an agreed-upon location. When Ray and Robbins arrived, Fugett got into their SUV. A few minutes later, he returned to Fields' car with a shotgun, and stated that "he shot the boys when one pulled the shotgun on him." She drove him to his apartment as he cleaned blood from the shotgun. He gave her the shotgun and a handgun to hide. Fields later gave a statement to the police and the guns were recovered.

Ray and Robbins both suffered fatal wounds, consistent with having been shot in the back as they fled. A clerk at the location identified the man they'd met with as Bosco - an alias for Fugett. A few days later, investigators learned Fugett was being released from jail on an unrelated charge and they approached him. He agreed to accompany them to police headquarters, nearby. (This release took place in the late evening.)

"During the initial portion of the interview, Fugett led the officers to believe he had information and would be willing to assist in the investigation." However, in the early morning hours the next day, while still at police headquarters, he approached a detective and indicated for the first time that he may have had a role in the incident. Thus, when the detectives returned at 5:50 a.m ., Fugett was given his Miranda warnings. After executing a waiver, Fugett informed the officers he had been present at the shootings. He denied pulling the trigger, but he admitted he had hidden the guns. He was then arrested. Around 10:30 a.m., he again approached the officers and said he had shot the victims in self-defense using a pistol he had taken from Ray's pocket.

Fugett was convicted of two counts of Manslaughter and one of Tampering with Physical Evidence. He was convicted, and appealed.

ISSUE: Is interrogation at a police station automatically custodial?

HOLDING: No

DISCUSSION: Fugett made a number of challenges related to trial procedure and jury selection. He also complained that "from the time he was taken from the jail to headquarters for questioning, he was in custody and entitled to his Miranda warnings." The Court noted, however, that when he was released, and met by the detectives, he was asked if he "would be willing to go to police headquarters and answer some questions." He was told "that he did not have to go and that he was free to leave." He chose to accompany the detectives and rode, unhandcuffed, in the back of their car. They entered through a non-public entrance and went to an interview room, where he was "often left alone, was never restrained, and was allowed free use of the restroom." He was allowed to have drinks and to smoke. Early in the discussion, he "led officers to believe he had information about the shooting and that he would assist in the investigation." He agreed he'd been at the service station across from the shooting location and that he knew one of the victims, and further that he stated he could identify witnesses and a vehicle involved. A few hours into the meeting, they drove him through the suspect area, and they provided food for him. Only after he admitted he may have had a role in the shootings was he given Miranda, and after that he told officers he had been at the shooting. He stated someone else had done the shooting, but he "admitted he had agreed to hide the guns." At that point, he was arrested. Fugett eventually claimed that the shooting was in self-defense.

Fugett argued that the approach was a "question first and then warn technique" prohibited by Missouri v. Seibert.[24] The Court noted the difference, however, in this case, in that Fugett was considered a witness, not a suspect, initially, and agreed, voluntarily, to be questioned. Before they began "systematic questioning, detectives properly provided him with his Miranda warnings." Further, the Court found that Fugett was not in custody prior to his actual arrest, so Miranda would not have been required. Fugett argued that the atmosphere was coercive, but the Court noted that was rejected in California v. Beheler.[25] In that case, "the Court recognized that "[a]ny interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime." Further, "the definition of custodial interrogation" focuses on "words and actions on the part of police."[26] In this case, Fugett voluntarily left the interview room at approximately 5:25 a.m. and "approached a detective to inform him that he had not been fully honest."

The Court found the interrogation was appropriate, but reversed the conviction due to problems with the jury selection.

[24] Seibert, supra.
[25] 463 U.S. 1121 (1983).
[26] Watkins v. Com., 105 S.W.3d 449 (Ky. 2003).

MISCELLANEOUS

Kentucky Growers Insurance Co. v. KSP
2008 WL 1991713 (Ky. App. 2008)

FACTS: In early 2006, a homeowner who was insured by Kentucky Growers (KG) "suffered a fire loss." The insurance investigator found that the fire was arson, but had no suspect. KSP was conducting an arson investigation at the same time. In August, KG provided all of its information to KSP, and in turn, requested any information that KSP might have on the matter, in particular, "pending investigation files." KSP refused the request, citing KRS 17.510(2) and KRS 61.878(1)(h). KG replied that it was making the request under KRS 304.20-160(4).[27] KSP again denied the request, but offered KG the opportunity to interview the investigator.

KG filed an administrative appeal of the denial. The Attorney General's Office agreed that KSP was correct in claiming the exemption under Open Records, but did not render an opinion on releasing the material under the insurance laws. KG filed for a declaratory judgment, but the court ruled in favor of KSP. KG appealed.

ISSUE: Must agencies provide copies of investigation materials to insurance investigators?

HOLDING: No (but see discussion)

DISCUSSION: The Court looked at the actual language of the statute. That statute permits insurance investigators to request information, but does not specify the form that information must take. The Court concluded that KSP's offer to provide the information through an interview with its investigator was "sufficient compliance under the" law in question. Further, the Court noted that KG was "entitled to the information contained in KSP's investigation files, but not to copies of the files themselves."

The trial court's decision was affirmed.

CIVIL LIABILITY

Simon v. Lexington-Fayette Urban County Government
2008 WL 1991710 (Ky. App. 2008)

FACTS: Prior to October 31, 2003, Simon had made numerous complaints that Lexington police officers were following him. In August, 2003, he had followed an officer to get a license plate number, and the department issued an "officer safety alert" about him. On October 31, Officers Haynes and Cook were dispatched to investigate Simon's complaint that "a coroner's van had been following him." "Officer Cook ultimately took Simon into custody and transported him to Eastern State Hospital for a mental evaluation pursuant to KRS 202A.041." Following a 72 hour waiting period, Simon was released.

[27] Statutes relating to insurance investigations.

Simon filed suit against Officer Cook and Lexington, alleging claims under 42 U.S.C. §1983. That case was dismissed.[28] However, the federal court "declined to exercise supplemental jurisdiction on Simon's state claims." Simon then filed suit in Kentucky state court, based upon the same facts alleged in the federal case. He claimed negligence, false imprisonment and related state claims, and also attacked the constitutionality of KRS 202A. (On a procedural note, Officer Cook and Lexington were properly officially served, but Officer Cook was never served in his personal capacity.) Lexington responded, claiming sovereign immunity, and also that the constitutionality of the statute in question had already been resolved. Eventually, the trial court dismissed the case against the defendants. Simon appealed.

ISSUE: Is Lexington- Fayette County entitled to sovereign immunity under Kentucky law?

HOLDING: Yes

DISCUSSION: The Court quickly concluded that Lexington-Fayette Urban County Government is entitled to the sovereign immunity awarded to county governments. (City governments, however, are not entitled to sovereign immunity.)

The Fayette County trial court decision concerning sovereign immunity was upheld.

Louisville-Jefferson County Metro Government v. Stoke
2008 WL 2468757 (Ky. App. 2008)

FACTS: On May 14, 2003, Stoke arrived at his part-time job at a local gun store. Since the owner had not yet arrived, Stoke went to a nearby restaurant. A short time later, he returned to the gun shop and pulled into an alley intending to park in the lot for the shop. He "noticed a police cruiser behind him with its emergency lights flashing," so he drove into the lot and stopped.

Several more cruisers pulled in as well, and as Stoke got out of his car, "two officers approached him on foot with their service weapons drawn." The two "officers gave contradictory commands – one ordering him to get on the ground and another ordering him to get back into his jeep." However, "[t]orn between these conflicting commands from police officers with drawn weapons, Stoke stood upright near his vehicle." One of the officers seized "Stoke's unconcealed sidearm from his person." The owner of the gun shop came outside and identified Stoke as an employee, and further said "be gentle, he's disabled, he got [sic] bone crisis, bone disease." "Despite this caution and despite the fact that Stoke's weapon had been secured, one of the officers forced Stoke to the ground, face down on the asphalt parking lot." Stoke later testified that he was handcuffed behind his back, and that the officer, "in so doing, either placed his elbow or knee on his back." Stoke alleged that action "caused him intense physical pain."

During this time, the officers confirmed that: "Stoke (1) worked for the owner of the gun shop; (2) had a proper concealed carry permit for his weapon, and (3) had no outstanding arrest warrants." When Stoke complained and asked to get up, "one of the officers yanked on the handcuffs behind

[28] See companion case in First Quarter, 2008, summaries.

Stoke's back and pulled him up, thereby causing a cut on his left wrist." They then removed the cuffs and returned his weapon.

Stoke filed suit for false arrest and battery. The officers, and the Metro Louisville government, asserted the defenses of sovereign immunity and official immunity. The trial court denied their demands and both the government, and the officers appealed.

ISSUE: 1) Is Louisville Metro entitled to sovereign immunity?
2) May officers automatically put a person who is armed with a handgun on the ground and handcuff them?

HOLDING: 1) Yes
2) No

DISCUSSION: First, the court quickly concluded that the Louisville-Jefferson County Metro Government was entitled to governmental sovereign immunity, finding the newly-merged government to be more akin to a county.

Next, the Court examined the claims of the officers for official immunity. Looking to Yanero v. Davis, the court noted that official immunity turns upon "whether the offending actions were 'discretionary' or 'ministerial.'"[29] Further, "official immunity from damages for a civil-rights violation actually only applies 'for good faith judgment calls made in a legally uncertain environment.'" In other words, "whether official immunity applies in any given case turns on the official's 'good faith,' or, in other words, upon the 'objective reasonableness' of his action under the circumstances."

Regarding the false arrest claim, Stoke did "not dispute that the officers responded to a call from a concerned citizens who had seen Stoke in downtown Louisville carrying a sidearm at his waist." Further, the Court stated, although it knew "of no law prohibiting a private citizen from carrying an unconcealed firearm, [it] acknowledge[d] that the frequency of such behavior in major metropolitan areas is sufficiently rare that [it could not] say that the officer's decision to make an investigatory stop was" improper. As such, the Court found the officers entitled to official immunity on that claim.

However, the Court did not extend that immunity to "their purported treatment of Stoke after the stop was made." The Court noted that:

> … if Stoke is able to prove at trial to the fact finder's satisfaction that the officers (1) issued conflicting commands; (2) forced him at gunpoint to the ground and handcuffed him in a rough manner despite warnings about his frailness; and (3) otherwise treated him roughly without any legitimate cause, then Stoke may prevail on his battery or excessive force claim.

Further, it stated that if his allegations are proved, they are an indication "that the officer's treatment of him went well beyond that which was necessary to conduct a reasonable investigatory

[29] 65 S.W.3d 510 (Ky. 2001).

stop," and that under Stokes version of the facts, "the officers had no plausible justification for handcuffing Stoke, forcing him to the ground, or otherwise treating him in the rough manner he alleges."

As such, the Court denied the officers official immunity on the battery or excessive force claim.

POLICE OFFICER BILL OF RIGHTS

Fournier v. City of Lawrenceburg
2008 WL 1103930 (Ky. App. 2008)

FACTS: Fournier, a Lawrenceburg police officer, was involved in two incidents in 2005. First, he allegedly threatened an individual by suggesting that if the individual, who had been arrested for DUI, "start[ed] giving {Fournier} a hard time in court" about the DUI charged, that he would further raise a marijuana charge. (He had seized a small amount of marijuana during the arrest.) The subject's father complained, and the Mayor suspended Fournier without pay, citing "a number of violations of the SOPs related to the … arrest." The second incident occurred a few months later, when Fournier refused to take a high school student into custody that had been found in possession of marijuana, a pill and cash. The school officials present complained of Fournier's conduct during the incident, that he had been "curt," "brusque," "condescending" and had treated them as if they were "stupid people." Again, Fournier was subjected to discipline.

On August 2, he was given a disciplinary hearing, and some of the charges related to the high school incident were upheld, including "discourtesy to the public." After conflicting testimony was taken from the chief, there was testimony from five officers that "it is not appropriate for an officer to arrest someone who has committed a misdemeanor outside of the officer's presence."[30] Fournier stated that the school officials did not cooperate with his investigation and that he could not "arrest" the student under the circumstances with which he was presented. With respect to the first incident, Fournier testified that the subject had stated he would bring charges of excessive force.

The Council found that the appropriate penalty for the high school incident was a six month suspension without pay, and for the DUI incident, dismissal.

Fournier filed an original action (a lawsuit) against the city and numerous other defendants. The Circuit Court dismissed most of the defendants, leaving only the City Council in the action. Fournier appealed the dismissal.

ISSUE: Is an appeal under KRS 15.520 to the Circuit Court a new trial, or simply a quasi-new trial that includes a review of the hearing transcript?

HOLDING: A quasi-new trial

DISCUSSION: The first issue concerns procedural matters, as Fournier named only the City of Lawrenceburg in his appeal, and that entity had already been dismissed from the case. He did not

[30] Note that barring specific exceptions, this is correct.

appeal the dismissal of the City, as he could have done, he simply named the City as a party in the appeal. He did not, however, name the City Council, which was the only party still officially in the case. Since KRS 15.520 requires the appeal be brought to contest the action of the hearing authority – in this case, the City Council. Because the essential party was not named in the appeal, the Court agreed the appeal was fatally flawed, and dismissed the action.

However, the Court further elected to address the substantive issues, as well, to settle the matter. The Court noted:

> Fournier notes that KRS 15.520(2) provides that an officer dissatisfied with the result from a hearing authority may bring an action in circuit court and that action 'shall be tried as an original action by the court.'" According to Fournier, in order to comport with due process, that statutory provision requires the circuit court to conduct a *de novo* proceeding and to review the evidence without regard to the findings of the hearing body.

The Court, however, relying on Brady v. Pettit[31], had "previously determined that KRS 15.520 entitles a discharged police officer to a quasi trial de novo before the circuit court," in which the circuit court may review the transcript of the initial hearing, and permit the officer to "call such additional witnesses as he may desire." The Court, then, was limited to making a "determination of whether the administrative body acted arbitrarily in deciding whether the employee violated the rules and regulations of the police department.[32] The Court affirmed its earlier decision that a quasi trial de novo was sufficient.

The Court further found that the testimony presented in the hearing was sufficient to support the City's contention that Fournier acted improperly in both incident, and upheld his dismissal on the merits, as well.

OPEN RECORDS

Com. of Kentucky, Dept. of Corrections v. Chestnut
2005 WL 3544299 (Ky. 2008)

FACTS: Chestnut was a prisoner at the Western Kentucky Correctional Center. He made an open records request for his inmate file – asking for "[a]n entire copy of my inmate file excluding any documents that would be considered cofidential [sic]." The request was rejected as being "too broad and overly vague" – the custodian "stated that Chestnut 'must describe the record (forms) with reasonable particularity, so that the records can be identified.'" Chestnut appealed the denial to the Attorney General, and also amended his request. He included a "list of several types of documents he wanted to see," as well as making "a demand for 'any and every document contained within my file from the front cover to the back." Chestnut also argued to the Attorney General that he "believed his initial description 'was clear enough for a laymen [sic] to have understood.'"

[31] 586 S.W.2d 29 (Ky. 1979).
[32] Stallins v. City of Madisonville, 707 S.W.2d 349 (Ky. App. 1986).

The WKCC produced 138 pages, but refused to comply with "Chestnut's blanket request for all other nonconfidential documents in his file because the WKCC continued to insist that the request was still 'vague' and 'overly broad….'"

The Attorney General upheld Chestnut's position, finding that the current line of opinions upheld the validity of requests for "complete personnel records" and that they AG found no reason to find differently for an individual inmate's records.

WKCC and the Dept. of Corrections appealed the matter to the Franklin Circuit Court. After some months, the trial court found in Chestnut's favor. Again the DOC appealed, and again, the Kentucky Court of Appeals upheld Chestnut's decision. Once more, the DOC appealed, to the Kentucky Supreme Court.

ISSUE: Must an Open Records request specify the precise documents desired?

HOLDING: No

DISCUSSION: The Court reviewed the Kentucky Open Records Act, KRS 61.870. The Court noted that the statute permitted "any person" to seek review of the records, and noted that no class of person is held to a "more stringent standard when submitting open records requests." The presumption was "even stronger when a person, like Chestnut, seeks access to public records pertaining to himself."[33] The Court noted that the statute only required that records be described, not that they be "particularly described." The Court found that it "appears obvious to [the Court] that Chestnut's request was adequate for a reasonable person to ascertain the nature and scope of Chestnut's open records request." The Court stated that Chestnut "was required to do nothing more and, indeed, likely could not have done anything more because he could not reasonable be expected to request blindly, yet with particularity, documents from a file he had never seen." (Further, a footnote to the opinion notes that he would not be permitted to enter the offender records office to physically inspect the file.") Even though the DOC's policy required a "reasonably particular description of the records being requested," that regulation could not be upheld because it required more than the statute. The Court found that the "Attorney General's decision to extend its treatment of school employees' personnel files to an inmate's request to see his own inmate file was logical, and it was not arbitrary."

Finally, the Court found that complying with the request (and presumably with those of other inmates) would not be an unreasonable burden on the DOC, even if it was "tedious and time-consuming work." The Court noted that the DOC had indicated that each inmate had more than one file, in more than one location. The Court pointed out, however, that Chestnut only asked for his files from WKCC (although he may not have even realized the files were held in multiple locations) and further, that DOC could "reorganize its materials in such a manner as to more easily facilitate open records review by inmates, the general public, and DOC personnel" and that Kentucky law strongly suggested that records management be done in such a way as to expedite records recovery.

[33] KRS 61.884.

The Court agreed that a few of the documents in the file could be held back, but that the "prospect of a public agency's potentially negligent disclosure of protected items is simply an insufficient reason to thwart the openness the General Assembly sought to achieve when it enacted the Open Records Act."

The Court concluded by quoting Justice Brandeis - "[s]unlight is said to be the best of disinfectants[.]"[34] The Court upheld the lower courts' decisions in Chestnut's favor.

[34] Buckley v. Valeo, 424 U.S. 1 (1976).

Sixth Circuit

SEARCH & SEIZURE - SEARCH WARRANT

U.S. v. Slaughter
274 Fed. Appx. 460 (6th Cir. Mich. 2008)

FACTS: On Aug. 2, 2002, Detroit officers executed a search warrant on Slaughter's home. They recovered a firearm and a "bag containing narcotics." The search warrant read as follows:

> *1.) The Affiant is a sworn member of the Detroit Police Department, currently assigned to the Narcotics Division working in conjunction with a credible and reliable SOI[35] #2073 regarding the sale of illegal narcotics from [19675 Buffalo Street]. Information from SOI #2073 has led to the seizure of narcotics, narcotics proceeds, narcotics paraphernalia and firearms. SOI #2073 has been used by the Affiant and other members of the Detroit Police Narcotics Division on over 3 occasions resulting in over 5 arrest[s] for Violation of Controlled Substance Act and other offenses, and over 2 conviction's [sic] in 3rd Circuit Court and 36th District Courts, with cases still pending in 36th District Court and 3rd Circuit Court.*
> *2.) On 08/24/02, Affiant met with SOI #2073 to formulate a plan to attempt to make a controlled purchase of Narcotics from the above-described location. The SOI was searched for money and drugs with none being found and issued a sum of Secret Service Funds with which to attempt to make the purchase. The Affiant then observed the SOI enter the target location, stay a short time, and then return directly to the Affiant. The SOI turned over a quantity of suspected cocaine, which the SOI stated (s)he purchased at the above-described location and from the above-described sellers with the issued Secret Service Funds provided. The SOI was again searched for money and drugs with none being found.*
> *3.) The suspected cocaine was then conveyed to the Narcotics Section where a preliminary analysis was performed by P.O. Gerald Parker, where the test indicated positive for the presence of cocaine. The cocaine was then placed into LSF #508923.*
> *4.) Affiant has been in numerous narcotic raids in the City of Detroit. In the overwhelming majority of these raids, firearms and/or weapons were found used to protect illegal narcotic activity and seek to remove the same.*
> *5.) Therefore, Affiant has probable cause to believe that the above listed items will be found on the premises of the above-described location.*

Although originally charged under state law, Slaughter was transferred to federal court. There, Slaughter moved for suppression of the warrant, arguing it lacked probable cause, but the trial court disagreed. After a lengthy delay in the case, because Slaughter, who was free pending trial, disappeared, Slaughter made a second motion to suppress, claiming that the SOI did not come to his house on the date of the alleged controlled buy. This was supported by affidavits from

[35] Source of Information.

Slaughter's friends. The Court ordered a Franks[36] hearing. The prosecution provided considerable evidence supporting the warrant. Slaughter offered information from the witnesses, as well as documents that were allegedly "left behind in Slaughter's house by the officers executing the search." He claimed the documents "showed that Detroit police officers manufactured informants and controlled buys on the fly when executing unlawful searches." The Court ordered the prosecution to produce the SOI for an *in camera*[37] hearing. The prosecution was unable to do so, however, because the Detroit PD had not continued to use the SOI in the intervening years and had lost track of him. The Court denied Slaughter's suppression motion. He took a conditional guilty plea and then appealed.

ISSUE: May a tip from a CI be corroborated by a controlled buy?

HOLDING: Yes

DISCUSSION: Slaughter argued that the warrant lacked probable cause "because it contains no assertion that [the] SOI … observed narcotics in the home or that officers observed narcotics traffic in and around the house." The Court noted, however, that in this case, "the affidavit was not based on an informant's tip, but on the controlled purchase of cocaine at a residence by a reliable source with whom the affiant had previously worked, which purchase was independently corroborated by the affiant." In addition, when "a complete stranger goes to a residence to purchase cocaine and actually gets it, no matter the quantity, it is reasonable to infer that more drugs may be stored there." Further, the Court found that the Franks claim also failed, in that there was no evidence that any false statements were included in the affidavit, either intentionally or recklessly. The Court noted that nothing required an informant be produced at a suppression hearing, and only requires it at trial under specific circumstances. (Not to mention that Slaughter himself caused the lengthy delay, and that had he not jumped bond, the situation may have been different.)

The Court affirmed the denial of his suppression motions.

SEARCH & SEIZURE - TERRY

U.S. v. Young
2008 WL 2001729 (6th Cir. Tenn. 2008)

FACTS: On the day in question, Officers Gray and Smith later testified that "Young made a 'flagging' gesture toward the officers," and that he "asked the officers [apparently in plainclothes] if they were looking for marijuana.," This took place in a complex known as a drug hot spot. When he realized the two were police officers, however, Young walked away. As a result, the officers stopped and frisked Young, and a gun and marijuana were found.

Young, a felon, was charged, and ultimately convicted. He appealed.

ISSUE: May a person who is suspected of carrying drugs be frisked?

[36] Franks v. Delaware, 438 U.S. 154 (1978).
[37] In chambers.

HOLDING: Yes (but see discussion note)

DISCUSSION: The Court ruled that "[o]fficers who stop a person who is "reasonably suspected of carrying drugs" are "entitled to rely on their experience and training in concluding that weapons are frequently used in drug transactions."[38] The initial stop, based upon a combination of factors, was also upheld.

Young's conviction was affirmed.

NOTE: This is a federal case, and Kentucky state courts may not rule in exactly the same way, however.

SEARCH & SEIZURE - WARRANT

U.S. v. Williams
272 Fed. Appx. 473 (6th Cir. Ohio 2008)

FACTS: In 2005, Det. Daniel (Canton, Ohio, PD) received a couple of complaints concerning illegal drug activity at a Canton residence. He followed up with a CI who confirmed that the house resident sold crack cocaine. The CI had provided reliable information to another officer during "prior unrelated investigations."

Det. Daniel began surveillance on July 22, and watched the house on ten different occasions. He observed a number of people making short visits, and the CI made three controlled buys. Williams, a convicted felon, was identified as the seller.

Daniel sought, and received, a no-knock warrant. A Canton SWAT team executed the warrant on Aug 17, finding Williams asleep on the couch. After cuffing Williams, Det. Davis noticed that he reached "repeatedly for a ceramic plate" sitting under the couch. Knowing that such plates were often used to cut crack cocaine, using razor blades, he had Williams removed from the couch. They asked him about weapons, and he stated there was a firearm upstairs. This proved to be false. He then stated that there was a firearm under the couch, and that "turned out to be true."

Williams was convicted for both the drugs found in the house, and the firearm. He requested suppression, and was denied. He took a conditional guilty plea, and appealed.

ISSUE: Does a clerical error involving a date invalidate a warrant?

HOLDING: No (if adequately explained)

DISCUSSION: Williams challenged the probable cause for the warrant, in that the warrant, mistakenly, listed the year as 2004, rather than 2005, making it apparently stale. Det. Daniel

[38] U.S. v. Heath, 259 F.3d 522 (6th Cir. 2001).

explained this as a clerical error. There was no challenge to the remainder of the information. The Court accepted Det. Daniel's explanation and upheld the warrant.

The Court also noted that despite his assertion that the officers failed to knock and announce, which they admitted, that suppression of the evidence was unnecessary. The Court declined to even consider the alleged knock and announce violation.

Williams also argued that his statement concerning the firearm should have been suppressed. The prosecution countered that it was admissible under the public safety exception to Miranda, pursuant to New York v. Quarles.[39] To qualify for the exception, and officer must have a "reasonable belief that he is in danger" – a reasonable belief "that the defendant must have (or recently have had) a weapon" and "that someone other than police might gain access to that weapon and inflict with it." The exception applies "if and only if" "each of these two conditions is met."

In this case, Williams's criminal history indicated a willingness to use weapons, and in addition, the crime of which he was suspected also led to a reasonable belief that he had a weapon. Other circuits that have interpreted Quarles "have held that the public safety exception applies to inquiries made when the defendant is handcuffed." The Court found it evident, from the context, that the question "was not posed as an investigatory interrogation, but rather as an attempt to prevent Williams from gaining access to a dangerous weapon."

Williams's motion to suppress was properly denied, and his conviction was upheld.

U.S. v. Hawkins
2008 WL 2178104 (.6th Cir. Ohio 2008)

FACTS: In June, 2006, Canton (Ohio) officers received information on a large quantity of crack being sold by "Hulk" at his residence. They located the residence as described by an informant and the two vehicles associated with the house, also described by the informant.

Det. Miller contacted the CI to get further information. That CI confirmed the residence and the other information given by the first informant, and also identified Eve Ramsey as living at the residence and owning one of the suspect vehicles. The officers then had the CI do a controlled buy, and he made a buy, under the direction of supervision of the officers. He identified Hawkins from a photo array as the person he knew as Hulk. A few days later, he made a second buy.

On July 19, the officers got a no-knock search warrant, using additional information they had gleaned about Hawkins, specifically concerning his violent criminal history. On July 21, they did a search, finding substantial drugs, cash, and various paraphernalia. Hawkins was charged with trafficking and requested suppression. After that was denied, Hawkins took a conditional guilty plea, and appealed.

ISSUE: May corroboration substitute for a statement of CI reliability?

[39] 467 U.S. 649 (1984).

HOLDING: Yes

DISCUSSION: Hawkins argued that the CI "was not a proven, reliable, or credible source." He also argued that "several statements in the warrant affidavit were false, and therefore, he was entitled to a [Franks] hearing."[40] The trial court had determined that Hawkins' argument for mistaken identify did not meet the standard of reckless disregard, and that it is insufficient for a defendant to simply argue that statements in a warrant are false. The trial court refused to look beyond the four corners of the warrant, although it had permitted Hawkins to call the officers to testify. The Court had then denied the motion.

Hawkins argued that the statements made by Det. Miller showed that he had made false statements - as an example, that he testified that he drove around the block after dropping off the CI, in contravention to his statement in the warrant that he watched the CI enter the house. The Court, however, noted that Hawkins had mischaracterized the warrant. The warrant stated that:

> *Det. Miller "followed [CI#403] to the residence of 2319 3rd St. NW and had [CI#403] observed enter and exit the residence by members of the Vice/Criminal Intelligence Unit. [CI#403] was never out of visual contact during the transaction other than when [CI#403] was inside the residence." Nowhere in the warrant affidavit does Det. Miller state that he personally observed Hawkins entering the residence; rather, he states that other officers in the Vice/Criminal Intelligence Unit observed CI#403 enter and exit the residence. Therefore, Hawkins' suggestions to the contrary are simply wrong and without support.*

"The court agreed that when a CI is not verified as reliable by the affiant, it is essential that the police corroborate the information provided. As such, in this case, although there were no statements in the warrant affidavit about the reliability of the confidential informant, based on the controlled buy the court concluded that the informant's information was sufficiently corroborated and, thus, the warrant affidavit provided sufficient probable cause.[41] In this case, the Court found that the totality of the circumstances "created a fair probability that drugs or other evidence would be found at Hawkins' residence."

Hawkins's plea was upheld.

SEARCH & SEIZURE

U.S. v. Terry
522 F.3d 645 (6th Cir. 2008)

FACTS: On October 14, 2004, AOL "intercepted two e-mail messages containing a known child pornography image." AOL transmitted the messages, and all related information to the National Center for Missing and Exploited Children (NCMEC), and they, in turn, contacted the Immigration and Customs Enforcement (ICE). ICE them issued a subpoena to AOL for information

[40] See Franks v. Delaware, 438 U.S. 154 (1978).
[41] See U.S. v. Coffee, 434 F.3d 887 (6th Cir. 2006).

concerning the individual behind the screen name listed in the messages, and AOL identified the individual as Roy Terry, who lived in Cincinnati, Ohio. ICE confirmed Terry's address with the Post Office.

ICE obtained a warrant for that address and it was executed on March 21, 2005. The Court noted that ICE was interested not in Roy Terry, but in Brent Terry, Roy's adult son, "because the e-mail account used to send the image was registered specifically to the younger Terry." During the search, Roy Terry indicated that his son lived at a separate address, which he rented from his father, and confirmed his son's email address name. ICE then got a warrant for that address, and collected a laptop computer, three hard drives and "various external media." They found 123 images and eight videos of minors engaged in sexually explicit conduct.

Brent Terry was charged with possession of the images. He requested suppression, which was denied, and then took a conditional guilty plea. He appealed.

ISSUE: Should detailed information (such as IP addresses) be included in computer search warrants?

HOLDING: Yes

DISCUSSION: Terry argued that "there was an insufficient nexus to connect the intercepted child pornography image to his home computer, arguing that the AOL e-mail account used to send the illicit image could have been access from any computer with an Internet connection." Given what they described in the search warrant, however, that two emails were sent from a specific screen name, that the name was registered to Brent Terry, that Brent Terry lived at a specific address and was known to have a computer at that address, the Court found it "require[d] no great leap of logic to conclude that the computer in Terry's home was probably used to send the intercepted messages." Although the court admitted there might be other possibilities, such as a hacker, it noted that "probable cause does not require 'near certainty,' only a 'fair probability.'"

The Court noted that Terry argued that "there was no IP information either to tie his computer to the e-mail messages, or even to limit the possible number of computers that could have been used to send the message." Although the court noted that "any IP or other information that could have more specifically tied Terry's home computer to the e-mail messages would certainly have been welcome," it was satisfied that the information provided was sufficient to support the likelihood that the images would be found on Terry's home computer.

The Court, however, was "somewhat troubled by the fact that the *content* of the incriminating e-mail messages was apparently not preserved." (Apparently, the image itself was, but not the message that accompanied it.) Terry argued that without that, he could not successfully argue that his message might have been simply a reply to an unsolicited child pornography message. The Court, however, noted that "absent any evidence that innocent persons frequently receive and reply to unsolicited child pornography spam (and in a way that would produce the computer traces in this case)," it could not say that the search warrant was issued inappropriately.

Terry's plea was affirmed.

VEHICLE STOPS

U.S. v. Murphy
2008 WL 2127929 (6th Circ. Tenn. 2008)

FACTS: On Dec. 31, 2003, Deputy Bedsworth (Lawrence County, TN Sheriff's Department) made a traffic stop of a vehicle that had run a stop sign and forced another vehicle off the road. The driver got out, but returned to his vehicle when so ordered. As he did so, however, the deputy "saw him push a rifle barrel from the driver's side over to the passenger's side." He ordered Murphy to put his hands on the wheel, which he did, and the deputy smelled the odor of an alcoholic beverage. He then ordered Murphy out of the truck.

Deputy Bedsworth could see inside the truck, and he spotted an open beer can and a bag with additional beer. Murphy admitted to drinking one beer, and explained the weapon as he had been hunting. He also volunteered that his license was suspended. Dep. Bedsworth got consent to do a pat-down search, "during the course of which he found Murphy's Tennessee identification card." He assured Murphy that he was not under arrest. However, after confirming that he did have a revoked license, the deputy arrested Murphy.

In addition to state charges, Murphy was indicted on being a felon in possession of a firearm. Murphy moved to suppress the evidence, and the trial court denied it. Murphy was convicted, and appealed.

ISSUE: Does a defective incident report invalidate an officer's testimony?

HOLDING: No

DISCUSSION: The Court reviewed the circumstances of the stop and Murphy's assertion that the deputy's "incident report and his testimony at the suppression hearing were incomplete and contradictory, and failed to demonstrate that the deputy had probable cause for making the traffic stop." The Court agreed "that, while Deputy Bedsworth's incident report was not without error, his testimony was not unreliable." The Court found that everything else found as a result of the stop, the weapon, was admissible as the product of a valid traffic stop.

Murphy's conviction was affirmed.

NOTE: This case, does, however, emphasize the need to write complete and accurate reports, as a future case could find the errors sufficient to fatally damage the case.

U.S. v. Blair
524 F.3d 740 (6th Cir. Tenn. 2008)

FACTS: On March 25, 2004, Officer Munday and Holmes (Knoxville, TN, PD) were on surveillance of a residence, which was suspected to be the source of drug trafficking. Officer Munday, undercover, observed subjects making "hand-to-hand drug purchases." During the surveillance, he had a clear view of the house from four doors away.

At about 10:35 p.m., he spotted a man, later identified as Blair, get out of a car at the residence and talk to the owner. Although Munday was familiar with Blair, "he could not recognize Blair from his vantage point." He saw them make what he believed to be a drug transaction. He did not believe he had enough for probable cause, however, so he watched until Blair left the house. Officer Munday observed Blair "roll through a stop sign" and he contacted Holmes (via Nextel walkie-talkie) as to what had occurred, but he did not, specifically, instruct Holmes to make a stop.

Because Holmes could not see the suspect house, he did not know what car Blair was actually driving. However, when he "saw Blair's car approach from the direction of the suspect house," he fell in behind and stopped him for what he told Blair was a "tag-light" violation. He determined that Blair had a valid license and no warrants, but noted that Blair was fidgety and kept reaching under his seat.

Officer Holmes later testified that he was told by Munday immediately upon learning that Blair's license was valid that he (Munday) had observed him in a drug transaction and that he'd committed a traffic offense. However, video evidence suggested he did not learn this for some four minutes after the license check came back valid. Officer Munday had, however, heard Holmes mention Blair's name on the radio, and told him that he'd encountered Blair before, with an assault rifle, and that he'd attempted to flee. Officer Holmes asked his partner to come to the scene of the stop and identify Blair.

During that time, Officer Holmes asked Blair for permission to search the car, and was refused. Officer Holmes told Blair that if he didn't agree, he would call for canine, and was still refused. He returned to his car, called for a canine unit, and then went back to talk to Blair further. Blair questioned Holmes repeatedly as to why he'd been stopped, and during that time, he continued to reach under the seat and toward his ankles. Holmes told him to stop doing that, retreated and called for backup. Blair got out and asked if he could check his tag light, and Holmes thought Blair was preparing to flee. Later evidence indicated the light was working, but Holmes testified it was too dim to reach the license plate.

Officer Munday arrived during that time, as did two other backup officers. Holmes explained to Blair that a dog was on the way, and if the dog did not alert, he was free to go. However, he also said that if the dog did alert, they would have probable cause for a search. When the dog arrived, Blair was instructed to get out. When he reached in a pocket, he was ordered to submit to a patdown, and Holmes felt a lump that he believed, and which was found to be, packages of crack cocaine. Blair was arrested.

Blair was indicted on federal narcotics charges, and moved to suppress. Blair then took a conditional guilty plea, and appealed.

ISSUE: Is a subject's presence in a high crime area late at night sufficient to justify a Terry stop?

HOLDING: No

DISCUSSION: Blair argued that the stop was initially improper, but the Court credited the trial

judge's decision to the contrary. The trial court chose to believe Officer Holmes's statement that the light was, if functioning at all, not functioning correctly. (The Court, however, "entertain[ed] serious doubt as to Officer Holmes's justification for the stop, primary because the video evidence shows that the tag-light was fully operational.") However, the trial actually found the stop also valid under Terry v. Ohio, and the appellate court elected to analyze the case based upon the trial court's reasoning.

First, the Court looked at the validity of a Terry stop based upon the officer's knowledge that Blair had just "left a known drug house in a high-crime drug-trafficking area at night." The Court noted, however, that Officer Holmes could not even be certain that Blair was the person that Munday saw leave the house, and he had to have Officer Munday come to the scene of the stop, some six minutes later, to confirm it. The Court considered whether the late hour, and the high-crime reputation of an area, justifies a Terry stop, and found it does not, although it might certainly be combined with other factors to find probable cause. The trial court had also looked to Munday's assertion that he had witnessed a drug transaction. However, because Holmes stated he did not know of that allegation until the stop was made, the Court found that it could not have been a factor in his decision to stop.

The Court also looked at the government's theory that the collective knowledge of the two officers could be congregated. Unlike the case cited in by the prosecution, in this case, however, Officer Holmes did not receive the information Munday had concerning the drug transaction, and as such, could not rely upon the knowledge of his fellow officer to support the stop.

The Court found that Officer Holmes lacked sufficient reasonable suspicion to support the lengthy stop, and as a result, all evidence found as a result of that detention must be suppressed.

U.S. v. Luqman
522 F.3d 613 (6th Cir. Ohio 2008)

FACTS: In August, 2008, Officers Donohue and Falcone (Akron, OH, PD), both experienced officers, were on patrol in an area known for prostitution activity. At about 11:40 p.m., on August 19, Officer Donohue "noticed two African-American women standing on a street corner." He watched as one of the women approached a pickup truck, stopped in the travel lane, which was driven by Luqman. Donohue made a U-turn, at which time the "woman ran from the truck back to the sidewalk." The truck moved off and Donohue followed, eventually stopping the vehicle.

When asked, Luqman said he was in the neighborhood looking for a friend, and denied soliciting prostitution. He proferred an operator's license as ID, and when it was found to be suspended, he was arrested. Following agency procedures, Falcone did an inventory search and found a handgun concealed in the car. Luqman was further charged with having the concealed weapon.

Luqman, a convicted felon, was charged in federal court on the weapon's charge, and moved for suppression. The trial court denied the motion, and he was eventually convicted. He appealed.

ISSUE: Is presentation of a suspended operator's license by a driver sufficient to end the "investigatory" stop - moving it to an arrest?

HOLDING: Yes

DISCUSSION: The Court noted, first, that there is no "bright-line rule to determine whether an officer had reasonable suspicion," but instead, that one must look at the "totality of the circumstances surrounding the stop to determine whether the officer had a 'particularized and objective basis' for suspecting criminal activity." Using a two part analysis, the court first found that "there was a proper basis to stop Luqman based on the police officers' awareness of specific and articulable facts that [gave] rise to reasonable suspicion" and second, found that the "degree of intrusion into the suspect's personal security was reasonable related in scope to the situation at hand…." With respect to the first prong, the Court considered the location and the officer's prior experience with such offenses, along with the behavior of both Luqman and the woman. The officer asked "as few questions as possible," and upon asking for, and receiving, a suspended identification, the officer immediately had probable cause for an arrest, thereby ending the investigatory phase of the stop.

Luqman's conviction was affirmed.

U.S. v. Simpson
520 F.3d 531 (6th Cir. Tenn. 2008)

FACTS: On Feb. 21, 2006, Officer Ratcliff (Cleveland, TN, PD) was parked on I-75, observing traffic. A black Nissan caught his eye because it had "extremely dark" window tint and had a "'weathered' temporary license plate that was not 'clearly legible.'" The officer elected to follow the car to verify his suspicions and found that the car was from Ohio, and he could read the numbers on the tag, but not the expiration date. The tag was torn and "coming apart basically." Officer Ratcliff made a traffic stop. He found, upon examination, and despite its condition, that the tag was valid for one more day. He approached the passenger side of the vehicle, and the female passenger rolled down her window. Officer Ratcliff detected the "stench of burnt and raw marijuana." He asked for the driver's, Simpson's, license and "Simpson - without prompting from the officer - asked whether his tag had fallen off." The officer replied that it had not, but looked like it could at any moment.

Officer Ratcliff then asked if he could search the car, and was refused. The officer, a K-9 handler, then put his dog on the car, and the dog alerted. Based upon that information, the officer searched the car and found three kilos of marijuana in the trunk.

Simpson was arrested, and moved for suppression. When that was denied, he took a conditional guilty plea, and appealed.

ISSUE: Is reasonable suspicion sufficient for a traffic stop?

HOLDING: Yes

DISCUSSION: First, the Court considered Simpson's argument that Ohio law should be the determining factor, not Tennessee law, with respect to the condition of the temporary tag. The Court, however, quickly determined that Tennessee law was the appropriate law upon which to judge the stop.

Next, the Court discussed "whether Officer Ratcliff was required to have probable cause or merely reasonable suspicion that [a Tennessee law] was being violated before executing a traffic stop." The Court noted that "virtually every other circuit court of appeals has held that reasonable suspicion suffices to justify an investigatory stop for a traffic violation." The Court distinguished this case from an earlier Sixth Circuit case which did not permit such a stop, arguing that is different because the violation in this case was ongoing. The Court agreed that "reasonable suspicion of a completed misdemeanor is not sufficient to justify an investigatory stop," but found that "reasonable suspicion of an ongoing misdemeanor *is* adequate justification. The Court emphasized that "a seizure for an ongoing violation of *any* crime - no matter how minor - is governed by the standard of reasonable suspicion, not probable cause."

The Court upheld the stop, and further noted that "the officer immediately developed reasonable suspicion of the presence of drugs, permitting additional detention, and developed probable cause to search the vehicle upon the alert of a trained narcotics dog." The Court affirmed the decision of the trial court.

SUSPECT IDENTIFICATION

Keene v. Mitchell
525 F.3d 461 (6th Cir. Ohio 2008)

FACTS: Keene was identified by his victim (a car theft/robbery) from "two sheets of police photographs." She had apparently given the police a description that indicated that the suspect had a "box, squared hair"cut. Of the photos, only Keene had such a haircut. Keene was charged with this, and other, crimes, including multiple homicides. He was convicted by a 3-judge panel, and sentenced to death. He then appealed.

ISSUE: Is a photo array where on the suspect has a specified haircut fatally flawed?

HOLDING: No (but not good practice)

DISCUSSION: Keene argued that the identification was "unduly suggestive," but the Court found that "it was reliable under the totality of the circumstances." The Court found that the witness "had ample opportunity to view Keene at the initial observation." Her description of Keene was accurate, although admittedly not very detailed. She also "displayed a high degree of certainty at the pretrial identification." In addition, the identification took place only two days after the robbery.

Keene's conviction was upheld.

U.S. v. Pickett
2008 WL 2076776 (6th Cir. Mich. 2008)

FACTS: On May 21, 2004, a Harper Woods (Michigan) bank was robbed. The teller told investigating officers "that she was very close to the robber, that she had an opportunity to view his face, and that she would be able to recognize him." She gave a specific description of the robber.

On September 22, the bank was robbed again, and again, the teller gave a specific description of the robber and stated that "she was focused on him, and that she would be able to recognize the robber if she saw him again." On October 1, another bank was robbed in nearby Royal Oak Township. The method was the same as the prior two robberies, and again, the teller stated that she could identify the robber.

Investigating officers, working together, released photos to the local news, and an anonymous caller pointed them to Pickett. All three tellers identified Pickett at some point. One, Styles, identified him "during a police-conducted photographic array display" prior to the creation of wanted posters showing Pickett's image. The other two, Reece and Jones, however, both saw the poster prior to making an identification.

After arrest and indictment, Pickett requested suppression of the identifications. The trial court denied the motion with respect to Styles's and Jones's, but held in abeyance the issue with Reece, as she could not be found for the hearing. She was located just prior to trial, testified in hearing, and again, the motion was denied. Pickett was convicted, and appealed.

ISSUE: Does a witness seeing a "wanted" poster for a subject, before viewing a photo array, fatally damage their subsequent identification of that subject?

HOLDING: No

DISCUSSION: The Court reviewed the law on suspect identification, and then examined each identification in turn. The Court ruled that each of the identifications was sufficiently reliable, despite some discrepancies, and found that the viewing of the poster, by two of the tellers, and the time that passed between the latter two identifications and their respective robberies (8 months and 14 months) and an inaccurate estimate of the robber's height, did "[n]ot create the type of circumstance that indicates a 'very high likelihood of irreparable misidentification.'"[42] Each of the identifications carried the "indicia of reliability" the law required.

Pickett's conviction was affirmed.

42 U.S. C. §1983 - ARREST

Ryan v. City of Hazel Park (Michigan)
2008 WL 2130370 (6th Circ. Mich. 2008)

FACTS: On March 23, 2004, Ryan awoke, not feeling well. She had two seizures that morning, and returned to bed until about noon. When she awakened again, she still felt unwell, but decided to visit her daughter at the home of her ex-husband, a drive of less than three miles. Upon arrival she had another seizure, and her daughter gave her some medicine and had her lie on the couch. She napped, and her daughter awakened her and told her "she needed to leave." The daughter walked Ryan to her car, and concerned, "asked if she would be able to drive home." Ryan said she could and "Middleditch rolled down Ryan's window a few inches and turned on the

[42] Manson v. Brathwaite, 432 U.S. 98 (1977).

radio to help keep Ryan alert." Ryan then left. As she drove, however, she "felt a seizure coming on and thought about stopping but decided she could complete the drive." Shortly thereafter, "her condition worsened," and she had no recollection of what occurred next.

During that time, Officer Weimer "saw Ryan's car swerve suddenly from one lane to another …." He pursued her, but Ryan continued to drive several blocks. Finally she stopped in a turn lane and the officer approached the car. Ryan drove off again, with Weimer behind. Ryan "continued for several blocks, stopping at a traffic light and running a stop sign in the process." She did not, apparently, speed. Two more officers joined the chase, and they were finally able to box her in and stop the car.

Officers Clark and Gielniak approached with guns draw. Ryan would not "show her hands or exit the vehicle," so Clark sprayed her with OC through the partially open window. When she still refused to open the door, Weimer broke the window with his baton and pulled her from the car. He used an arm bar takedown to get her on the ground. Officer Clark handcuffed her.

Ryan later testified that the first thing she remembered was "being outside of her vehicle and looking at Weimer just prior to being thrown to the ground." She suffered cuts to her right eye. She claims she is now panicked every time she sees an officer and that she suffers from nightmares and low self-esteem.

Ryan was convicted of fleeing and evading, and resisting arrest. She filed suit against the officers for excessive force, and the trial court granted the defendant officers, and the city, summary judgment on both the federal and pendant state claims. Ryan appealed.

ISSUE: Is the need for a particular use of force judged from the viewpoint of the subject or the officer?

HOLDING: The officer

DISCUSSION: The Court noted that a use of force must be judged from the point of view of the officers, not the individual. "Thus, even if the force used was unreasonable from Ryan's perspective because she was not in full control of her actions at the time, we do not judge the use of force from her perspective."

> In this case, Ryan was fleeing, resisting, and obstructing police officers. She led three police cruisers on a chase that lasted almost eight minutes. As Ryan points out, this was not a high-speed chase, and the testimony and police reports from the defendants indicate that Ryan was driving at or below the speed limit during the chase. However, a chase need not be high-speed to be dangerous, and the record indicates that Ryan disobeyed traffic signals and stop signs. The chase concluded only because the officers forced Ryan's vehicle to a halt. Once the chase did end, Ryan refused to follow the officers' directions to display her hands and exit the vehicle. Weimer had to forcibly remove Ryan from the vehicle, and Ryan resisted his efforts. Once he had Ryan out of the vehicle, Weimer used the straight-arm bar takedown to force Ryan to the ground. In doing this, he caused Ryan's head to hit the pavement, which resulted in a cut, a bruise, and swelling.

> Weimer testified he forced Ryan to the ground because he could feel her arm muscles tensing, and he believed she was going to resist being handcuffed.

Further:

> The three factors highlighted by the Supreme Court in Graham[43] weigh in favor of the reasonableness of the officers' use of force. First, although Ryan's initial crime was merely a traffic violation – swerving abruptly from one lane to another – Ryan ultimately committed the felony offenses of fleeing and eluding and assaulting, resisting, or obstructing an officer. This Court has held that officials are entitled to qualified immunity in the face of excessive force allegations even when the plaintiff "was suspected of relatively minor crimes" if the plaintiff resisted and the officials responded with force.[44] Second, Ryan posed an immediate threat to herself and the officers. She refused to place her vehicle in park, and it continued to push against Clark's cruiser even after the chase ended. Once she exited the vehicle, she was on a busy street and the officers wished to quickly place her in custody. Third, Ryan actively resisted arrest and attempted to evade arrest. If a reasonable officer would have recognized Ryan's condition and understood that her nonresponsiveness was beyond her control, this analysis might be different. However, under the circumstances, the officers could not be expected know that Ryan's non-responsiveness might be due to a seizure. Thus we find that, under the totality of the circumstances, the officers' actions were objectively reasonable.

The Court affirmed the grant of summary judgment.

Kelley/Allen v. McCafferty /Steubenville Police Dept. (Ohio)
2008 WL 2604328 (6th Cir. Ohio 2008)

FACTS: On Dec. 23, 2004, Officer Hanlin (Steubenville PD) requested a search warrant for Kelley's residence. The affidavit stated:

> *On 12-22-04, Steubenville Police Narcotics Detectives met with a reliable police confidential informant in regards to purchasing crack cocaine from Dawn Kelly. The informant has a history of providing reliable information and has participated in numerous controlled purchases.*
> *On 12-22-2004, Officers provided the informant with forty dollars in marked currency and searched the informant prior to any activity finding no contraband. The informant was fitted with an electronic transmitter for audio surveillance. Officers were able to view the informant enter 112 McDowell Avenue and were able to hear the informant make contact with Dawn Kelly. The informant exchanged forty dollars for crack cocaine. The informant was also able to view Ms. Kelly's crack cocaine supplier deliver further crack cocaine to the residence. Following the controlled purchase the informant provided officer with the narcotic which tested presumptive positive for cocaine base.*

[43] Graham v. Connor, 490 U.S. 386 (1989).
[44] See Wysong v. City of Heath, 2008 WL 185798 (6th Cir. Jan. 22, 2008).

> *With the above information and transactions, Officers believe there is further crack cocaine within 112 McDowell Avenue. The affiant request [sic] a no-knock and/or day/night warrant due to the fact that he believes there to be a risk of serious [sic] to officers. Officers are not aware of the number of subjects inside the residence nor the identity of the subjects inside. The affiant's experience shows that drug traffickers often possess firearms to protect their currency and/or narcotics.*

That same evening, Officers Hanlin and others executed the warrant, "without knocking and with weapons drawn." Kelley and Allen (her minor daughter) alleged the officers pointed their weapons at them, which officers denied.

They secured the two women and searched, finding crack cocaine and paraphernalia. Kelley was charged with trafficking and related charges.

At the time, Steubenville was under a consent decree, which "required the City to develop and implement a training policy for its officers, develop an internal affairs policy wherein there exists no discretion over whether to investigate a complaint, and track all uses of force and warrantless searches and seizures." That decree was terminated, because Steubenville was essentially in compliance for the mandated period of time, in 2005.

Kelley (acting on her own behalf and that of her daughter) sued based upon allegations of an invalid search and seizure. The defendant officers and the city sought, and received, summary judgment, Kelley and Allen appealed.

ISSUE: Does a search warrant entry, with guns, amount to an illegal use of force?

HOLDING: No

DISCUSSION: Kelley argued that the search warrant lacked probable cause. The Court noted that a "warrant is valid when the supporting affidavit provides a 'substantial basis' for the issuing magistrate" to believe "there is a fair probability that contraband or evidence of a crime will be found in a particular place."[45] The evidence indicated that a CI, who was reliable, had provided information, and that they made a successful controlled buy in that residence. In addition, the Court found that even if the officers aimed their weapons at the two women, that did not make the entry and subsequent search unlawful. The Court stated that "[b]ecause the police believed themselves to be entering an active drug house where weapons may be present, and with an unknown number of individuals inside, it was not unreasonable for them to have their weapons drawn upon entry." Kelley agreed that once she submitted, the officers no longer pointed their weapons at her. The officers had requested, and received, a no-knock warrant, so entering without knocking was not a violation.[46] The requirements for such are not, the Court noted, high, and "are less demanding than that of probable cause." The Court upheld the officers' actions.

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[45] Illinois v. Gates, supra.
[46] Richards v. Wisconsin, 520 U.S. 385 (2007).

Finally, since the Court found no liability on the officers, the case against the city also failed. The judgment of the trial court, dismissing the defendants, was affirmed.

Parsons v. City of Pontiac
533 F.3d 492 (6th Cir. Mich. 2008)

FACTS: On April 7, 2004, sometime prior to 6:50 a.m., Frantz, a firefighter, was shot at a fire station in Pontiac. He was discovered by an arriving firefighter. Frantz was unable to talk to police, however, as he was immediately sent into surgery. Later that day, investigating officers, however, learned that Parsons might be a suspect from Parsons's girlfriend. Parsons had been a probationary firefighter, and had expressed his displeasure with the fire department to his girlfriend. He had been fired just prior to the shooting. The detectives questioned other firefighters about Parsons. Many indicated having had no concerns about Parsons, and in fact, Frantz had apparently nothing to do with his firing, having served as only an intermittent supervisor. Others expressed that he was a possible suspect. One called Parsons and set up a meeting for lunch with him to discuss what had happened to Frantz. Officers met the pair at the restaurant. They found Parsons in his car, pulled him from the car and to the ground. He was taken to the station and was given Miranda warnings. He refused to waive his rights and was ultimately charged with attempted murder.

Officers searched Parsons's home, pursuant to a warrant. They found four guns, none of which was connected to the shooting. Parson's attorney provided a possible alibi, and police were able to document that Parsons was with a friend as late as 5:25 a.m., at the Auburn Hills police station, and the friend agreed that Parsons had actually been with her until around noon on April 7.

On April 8, officers were finally able to talk to Frantz. He was unable to identify the shooter, except to say that the shooter was taller that he was. He did not believe the shooter was Parsons. (Note, many of the documents in this case were misdated by one day, which confused matters.) He stated that the shooter knocked on the kitchen window to gain access, a common practice among the firefighters who did not have keys to the door. (Note, this information showed up in a supplemental report dated April 7, although it was agreed that they did not learn of this until April 8, from Frantz.)

On April 9, Parsons was released, although it was noted that he was still under investigation. He was, however, transferred to a psychiatric facility by the sheriff's department, from which he was released later in the same afternoon. After being held approximately 28 hours, Parsons was never officially charged.

Parsons filed suit against the officers and the City of Pontiac. The defendants filed for summary judgment, and following a hearing, that motion was granted. Parsons appealed.

ISSUE: Is probable cause (judged upon the officer's knowledge at the time) required for an arrest?

HOLDING: Yes

DISCUSSION: Parsons first argued that his arrest was unlawful, as it was not based upon

probable cause.[47] A lawful arrest must be based upon "reasonably reliable information that the suspect committed a crime."[48]

> Furthermore, "in obtaining such reliable information, an officer cannot look only at the evidence of guilt while ignoring all exculpatory evidence. Rather, the officer must consider the totality of the circumstances, recognizing both the inculpatory and exculpatory evidence, before determining if he has probable cause to make an arrest." *Id.* This court stated in Gardenhire that a bare allegation of criminal wrongdoing, although possibly justifying a brief investigatory detention, was insufficient by itself to establish probable cause that the suspect had committed a crime. Police officers may not "make hasty, unsubstantiated arrests with impunity," nor "simply turn a blind eye toward potentially exculpatory evidence known to them in an effort to pin a crime on someone."[49]

However, only the information available to the officers at the time must be considered.[50] Looking at the information in the possession of the arresting officers, the Court found a lack of clear probable cause supporting that arrest. They certainly had enough to consider Parsons a "potential suspect," but not enough for an arrest. The Court found that the arrest was not objectively reasonable. As such, the officers were not entitled to qualified immunity.

The decision of the trial court to grant summary judgment was reversed, and the case remanded for further proceedings.

Zantello v. Shelby Township (Michigan)
2008 WL 1986702 (6th Cir. Mich. 2008)

FACTS: On July 23, 2004, Zantello delivered a large water cooler to a business. During the moving of the heavy item, Zantello and the business owners (the Almansours) began to argue, and someone reported "an assault and battery" to the police. Officers Phelps and Underwood found a half-dozen people yelling at each other, and identified Zantello and one of the Almansours and the "central figures in the altercation." When a physical fight broke out, they arrested both men. Zantello was charged with felony assault, but Almansour refused to testify against him and the charge was dismissed. Zantello then filed suit against the officers and the township under 42 U.S.C. §1983, claiming excessive force, along with related Michigan state claims.

The defendant officers requested summary judgment, and the trial court denied that motion. The officers filed an interlocutory appeal.

ISSUE: May an excessive force lawsuit be decided by the judge in favor of officers, prior to trial, when there are disputed facts?

HOLDING: No

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[47] Fridley v. Horrighs, 291 F.3d 867 (6th Cir. 2002).
[48] Gardenhire v. Schubert, 205 F.3d 303 (6th Cir. 2000).
[49] Ahlers v. Schebil, 188 F.3d 365, 371-72 (6th Cir. 1999).
[50] Harris v. Bornhorst, 513 F.3d 503, 511 (6th Cir. 2008).

DISCUSSION: The Court noted that the officers clearly had probable cause to arrest Zantello for physical assault, based upon their own observation. The Court agreed that "[n]othing required the officers to wait until the individuals came to blows before arresting the would-be combatants…." Even accepting Zantello's claim that at the moment of the arrest, he did not have a bar in his hands, the court noted that more than one of the bars was readily accessible to him. The Court found the officers to be entitled to qualified immunity on this claim.

With respect to the excessive force claim, Zantello claimed the officers variously slammed him into a refrigerator, grabbed him and threw him around, pushed and manhandled him, twisted his arm, and slammed his head into the cruiser. Eventually, he claimed, he had to have surgery on his shoulder. The Court agreed that the evidence was not one-sided, but noted that the problem for the officers is that, according to Zantello, they continued to use force even after they had full control of the scene and even after he cooperated with them." The Court continued, stating that:

> … [m]ore fully developed facts might well reveal that the officers' use of force was reasonable—if, for example, the arm twisting was only slight and incidental to the officers' effort to restrain Zantello rather than a gratuitous post-arrest exercise of force. But because at this stage in the proceeding [the Court] must view the evidence in Zantello's favor, we agree with the district court that these allegations—supported by the record—create a triable issue of fact over whether the officers used excessive force.

Finding that such a right, to be free of excessive force, was already clearly established, the Court declined to give the officer summary judgment with respect to this claim.

Abdul-Khaliq v. City of Newark
275 Fed.Appx. 517 (6th Cir. Ohio 2008)

FACTS: In March, 2003, Abdul-Khaliq returned home to his girlfriend to find "four armed men demanding money" from her. He called 911 and reported the event, which was misinterpreted as a child abduction attempt. Officers Gross, Minton and Cook (Newark PD) were dispatched. In the meantime, Abdul Khaliq pursued the invaders.

When they arrived, the officers questioned a neighbor who was standing in the street, and the girlfriend, who explained what had occurred. She agreed that she had tried to get Abdul-Khaliq to take a "toy gun" with him when he left, but that he did not do so. Abdul-Khaliq returned to the house and later admitted that "he was angry and frustrated" when he approached the officers, and that he "asked the officers why they were not 'chasing after the criminals.'" The officers claimed that they tried to get Khaliq to let them pat him down, and that they told him to put his hands on the car. He claimed that when the officer demanded to know about a gun, that he cursed at them, that he didn't have a "f**king gun." "After debating with the officers about whether or not he was carrying a gun, Khaliq reached for his jacket." He claimed it "opened his coat as a non-threatening gesture to show the officers that he was not carrying a gun," but one of the officers "interpreted [the action] as an aggressive gesture." They then "sprayed Khaliq with pepper spray, shoved him to the ground, and handcuffed him." He was arrested for disorderly conduct.

Khaliq filed suit under 42 U.S.C. §1983, making a number of claims under both state and federal law. The defendants requested summary judgment. The trial court granted the motion on all claims, noting, however, that it was not clear that Khaliq had, in fact, alleged excessive force - a claim about which there was some confusion. The Court found the officers had probable cause to arrest Khaliq because of his admitted "yelling and cursing" at the officers.

Khaliq appealed.

ISSUE: May a judge decide a case in favor of officers, when the facts themselves are not disputed?

HOLDING: Yes

DISCUSSION: The Court agreed that the officers involved had sufficient probable cause to arrest Khaliq, who admitted at deposition that he was "being argumentative and uncooperative inasmuch as he admits to angry yelling and cursing at the officers while carrying on a prolonged debate about whether or not he had a gun." Further, the Court did not find that the force used, even under Khaliq's version of the event, was excessive, as it consisted of a "brief dose of pepper spray," being knocked to the ground and being handcuffed. The Court upheld the summary judgement in favor of the officers.

Carpenter v. Bowling (City of Franklin, Ohio)
276 Fed.Appx. 423 (.6th Circ. Ohio 2008)

FACTS: Prior to the date of the incident, Kirby and her former boyfriend, Combs, had an agreement that custodial transfers of their son, Tyler, would take place at the Franklin police station. On at least two occasions, Combs had failed to do so in a timely manner, and Kirby had filed a motion for contempt of court. On Aug. 16, 2002, Combs again missed the transfer, and upon representations that Kirby had a warrant for Combs, the officers went to his apartment.

There, the officers arrested Combs. Carpenter, Combs's sister, and Combs's mother were also present. Carpenter told the officers she had papers at her home that "would exonerate her brother" and the officers instructed her to get the paperwork. Carpenter, however, returned without them. She then called Combs's attorney to find out if they could make the arrest without a warrant. Officer Whitman spoke to Combs's attorney on the phone, who told the officer that the original agreement was unchanged. The officer also spoke to a children's services employee who told him that Kirby had a right to take Tyler. Officer Whitman gave Tyler to Kirby, who was in the parking lot.

During that time, Carpenter "was screaming profanities" and "throwing objects around in the apartment." She followed them into the parking lot, whereupon they arrested her for disorderly conduct. (Charges against Combs were dismissed.)

Combs, Tyler and Carpenter filed suit under 42 U.S.C. §1983, under false arrest and excessive force. The defendants requested summary judgment based upon qualified immunity. The trial court found that although they had a right to arrest Combs, they did not have a right to make the exigent entry into the apartment to do so. It also refused to grant the motions regarding excessive

force, finding that there were "disputes of material fact" regarding "Carpenter's conduct and the officers' explanations for using force." The defendant officers took an interlocutory appeal.

ISSUE: May an officer's concerns that a situation might escalate be sufficient cause to use an elevated degree of force against an individual?

HOLDING: No

DISCUSSION: First, the Court addressed the issue of the entry into the apartment. Although the officers stated that they had consent, Carpenter and Combs stated that the officers forced their way inside. Because of his dispute, the Court declined to grant summary judgment on the issue.

With respect to the use of force, the court noted that Combs admitted following the officers (with the child) out to the parking lot, and that she shouted at Kirby to remember her obligation to return the child at the appointed time. She denied cursing or threatening anyone. At that point, she was grabbed by Officer Bowling, and, she claimed, she was shoved to the sidewalk and "body slammed" into a vehicle. She also claimed that Officer Dickman put his knee into her back and grabbed her shoulder and that the two officers crushed her against a vehicle. She claimed that she wasn't fighting or resisting, and verbally told that them that she would permit them to arrest her. She suffered injuries to her hands and arms, and had medical treatment and physical therapy for those injuries. The Court noted that the crime at issue was disorderly conduct, and that its less serious nature weighed against the need for much force. Also, nothing suggested that she did more than speak loudly and nothing indicated she moved toward Kirby or threatened her. "In view of the non-threatening nature of Carpenter's offense, the absence of any resistance by Carpenter and the absence of any threat to anyone, a jury crediting these fact-supported allegations could find that the officers used constitutionally excessive force."

Further, the Court noted:

> The officers' complain that this conclusion fails to appreciate the risk of escalation they faced—as Carpenter was visibly upset about the situation with her brother, had voiced her frustrations to the officers and had previously been accused of harassing Kirby (several months earlier). Yet virtually any arrest of an individual by the police poses a risk of resistance and escalation. The question is whether that risk was real at the time the officers used force and, more pertinently, whether a triable issue of fact exists over that risk. Carpenter was 30 or 40 feet from Kirby and claims not to have done anything more than remind Kirby to return Tyler on Sunday. A jury could thus reasonably conclude, if it credited these factual allegations, that the police had no basis for immediately grabbing, shoving, body slamming and repeatedly crushing Carpenter against a van to prevent the situation from escalating. Even if we were to grant the officers' premise that they had a reasonable basis for fearing that the situation might escalate, moreover, that would not necessarily justify repeatedly crushing Carpenter against a van while jerking back hard on her arms—all in the context of arresting her for a relatively minor and non-threatening crime, one for which she "[a]t all times" did not resist the officers (save for raising her head to ask them to stop).

Finally, the Court stated that:

> The resolution of Carpenter's excessive-force claim in the end turns on several genuine issues of material fact, including at a minimum these: Was Carpenter walking toward, cursing at or otherwise threatening Kirby at the time of her arrest? Did the officers repeatedly body slam or crush Carpenter against the van and jerk back unreasonably hard on her arms? And did Carpenter resist the arrest or the officers' attempt to handcuff her? "[W]hen the legal question of immunity is completely dependent upon which view of the facts is accepted by the jury, the jury becomes the final arbiter of a claim of immunity." [51]

The Court affirmed the denial of summary judgment.

Kirby v. St. Clair County Sheriff's Department (Michigan)
530 F.3d 475 (6th Cir. Mich. 2008)

FACTS: At the time of the incident in this case, Deputies Duva and Carrier, and Sgt. Buckley, were members of the St. Clair County Sheriff's Department, as well as members of a county drug task force. In 2003, the task force had received information that Kirby was selling methamphetamine and crack cocaine from his home in the rural area of the county. After two successful controlled buys, they got a search warrant for the house. On Nov. 4, 2003, they met to discuss the service of the warrant, having been "told by informants that Kirby was a violent, paranoid individual who was often high, kept numerous weapons around his home, and had outfitted his residence with surveillance equipment." One source told them that Kirby always answered the door with a gun, made visitors undress to prove they weren't wired, and "stated constantly that the police were watching him." They decided to arrest Kirby when he was not at home.

Later that day, they found Kirby driving in the area. Deputies Carrier and Sgt. Buckley made a stop, and Kirby pulled to the shoulder of the road in obedience to their lights and siren. Deputy Duva pulled in front of the two vehicles, angling his vehicle, positioned so that Kirby "could not easily flee." For reasons unexplained, two motorists, Moore and Kornieck pulled over as well, some feet behind the cruiser. They could see Kirby's truck and the deputies, but not Kirby.

Deputy Carrier approached Kirby and ordered him to turn off the engine and raise his hands. Kirby did not comply, but it was unclear if Kirby could even hear the orders, given that the windows were up and the siren was still sounding. Sgt. Buckley was also approaching, as was Deputy Duva.

> The parties' accounts of the events that next unfolded, and that led to the fatal shooting, diverge significantly. According to Buckley, as he was walking on the shoulder of the road, the Ranger began to "back[] up towards [him]." He states that he heard the Ranger's engine revving, observed the truck's backup lights come on, and saw gravel flying from its tires. There was a distance of less than two feet between himself and the Ranger, Buckley estimates, as it came at him in reverse,

[51] Bouggess v. Mattingly, 482 F.3d 886, 888 (6th Cir. 2007).

> traveling seven to eight miles per hour. Buckley testified that he tried to get to the Ranger's side by stepping backwards and sideways, but could not avoid the vehicle, which backed up approximately twelve feet. Buckley claims that as he was pushed backward by the Ranger, he was forced to hang on to its tailgate. Buckley states that he then began to lose his balance and slipped down a muddy embankment towards the ditch. Fearing for his life, Buckley fired his gun into the Ranger four to five times. Buckley aimed at Kirby's head with each shot, "shooting to kill him."
>
> Seeing the Ranger move towards Buckley and hearing gunshots, Carrier and Duva also opened fire on Kirby. Both officers testified that they had seen Buckley slip behind the Ranger and feared that he would be run over as that vehicle reversed. At this time, Carrier was standing a few feet to the side of the Ranger, near its driver-side door. Carrier admits that he was not in danger. Duva claims to have been standing at the Silverado's rear passenger-side wheel well, and was similarly not then at risk.
>
> [The officers] claim[ed] that the Ranger briefly came to a stop after this first round of shots. They state that the Ranger then, however, lurched forwards towards Duva, its engine again revving. By one of the defendant's estimates, the truck drove forward at seven to eight miles per hour, and moved perhaps five feet. Fearing that he would be crushed between the Silverado and the Ranger, Duva again opened fire on Kirby. Carrier and Buckley followed suit. Buckley admits that he could see Carrier and knew that Carrier was neither in front nor back of the vehicle, and that Buckley could not actually see Duva to know whether he was in the Ranger's path.

Kirby was fatally injured. These events all occurred in a span of less than a minute. Kornieck's testimony essentially supported that of the officers, differing only in non-relevant details. Moore, however, testified that "the Ranger was moving in a non-threatening manner around the vehicles and officers." He stated the truck rolled backwards but that its backup lights were not on. He placed Buckley out of harm's way, near the cruiser's passenger-side tire, some 6-7 feet behind the Ranger. He claims the truck would have hit the cruiser rather than Buckley. Moore stated that Buckley left his "position of safety" and approached the moving truck, and that he stepped out of its way as it continued to move backwards. The only time he made contact with the Ranger was when he was using it for balance. He also claimed that Duva was not in the path of the Ranger as it moved forward, trying, Moore thought, to drive around Duva's vehicle. Moore further stated that the vehicle was not moving when shooting broke out, and that Kirby had apparently realized he couldn't drive around the vehicles boxing him in.

Kirby's estate representatives compiled expert testimony that the Ranger was stationary when the shooting erupted, and that "it had not posed a risk to anyone in the first place." Thirteen shots were fired, in total. Buckley fired eight shots, of which six struck Kirby. Carrier fired three shots, all of which struck Kirby. Duva fired two shots, both of which missed. Kirby was unarmed, but weapons and drugs were found at his home, later.

Kirby's widow and estate representative filed suit under 42 U.S.C. §1983 and a number of state claims. The trial court dismissed all of the claims except those made under §1983, finding that there were factual disputes that precluded a grant of qualified immunity. The evidence was sufficient for a jury to find that the officers used excessive force in repeatedly shooting him.

The officers filed an interlocutory appeal of that decision.

ISSUE: If an officer unreasonably places themselves in harm's way, may a subsequent use of force, in self-protection, be considered excessive?

HOLDING: Yes

DISCUSSION: In challenging the denial of qualified immunity, the officers argued that "there was no violation of a clearly established constitutional right even under Kirby's factual accounts because reasonable police officers in defendants' positions would have feared for their safety." The officers alleged that the trial court, "in denying summary judgment, improperly relied on the legal conclusions of Moore and failed to review the record from the perspective of a reasonable police officer." The Court, however, noted that to succeed in qualified immunity at this point, it is necessarily for the officers to accept Kirby's assertions as fact, and to only argue the law. (Certainly, however, the credibility of Moore's assertions as to what occurred may be challenged at trial.) The Court noted that "[w]here a police officer unreasonably places himself in harm's way, his use of deadly force may be deemed excessive."[52]

The Court concluded:

> Finally, and critically, defendants had sufficient time under plaintiffs' account to assess the situation before firing several rounds at Kirby. Moore estimates that the Ranger had been moving slowly, that the Ranger had been stationary for a few seconds before Buckley began shooting, and that another five to six seconds passed between when Buckley stopped shooting and when Duva began Moore also stated that the incident may have taken up to two minutes to play out. Under these facts, this was not, as defendants allege, a situation that required a "split-second" decision,[53] nor one where "a [possibly] dangerous situation evolved quickly to a safe one before the police officer[s] had a chance to realize the change."[54] Even if defendants were in close proximity to the Ranger and were thus unable to determine initially that Kirby did not pose a risk, each had an adequate opportunity to realize before shooting that the Ranger had stopped moving and that no one was in its path. We are mindful that "police officers are often forced to make split-second judgments — in circumstances that are tense, uncertain, and rapidly evolving. . . ."[55] However, the fact that a situation unfolds relatively quickly "does not, by itself, permit [officers] to use deadly force."[56] Here,

[52] Sigley v. City of Parma Heights, 437 F.3d 527 (6th Cir. 2006).
[53] see Graham v. Connor, 490 U.S. 386, 397 (1989).
[54] see Smith v. Cupp, 430 F.3d 766, 774-75 (6th Cir. 2005).
[55] Graham, supra.
[56] Smith, supra.

> even without "the 20/20 vision of hindsight,"[57], a jury could conclude that reasonable officers would not have perceived an immediate threat.

Further, the Court noted, the right to be free of unlawful force has been clearly established for some years. "Garner[58] made plain that deadly force cannot be used against an escaping suspect who does not pose an immediate danger to anyone." The Court affirmed the denial of summary judgment.

42 U.S. C. §1983 - COURT PROCEDURE

Cook v. McPherson
273 Fed.Appx. 421 (6th Cir. Tenn. 2008)

FACTS: On October 26, 2002, Cook and his family visited a Chattanooga restaurant for dinner. He was confronted by another individual outside. Cook sent his family inside, and then followed them. "During that time, the other party called the Chattanooga Police Department and claimed that Cook had flashed a knife and was threatening to use it." Officers McPherson and Bender arrived, and found Cook at the restaurant. Cook admitting, upon questioning, that he had a knife, so the officers "grabbed Cook's hands and put them behind his head." The officers "pushed him head-first through the restaurant's door, then drove him toward the ground, with his face to the pavement." As he was being handcuffed, one of the officers put his knee in Cook's back.

Cook was charged in the initial assault[59] on the individual outside, and for assaulting one of the officers, resisting arrest and carrying a weapon. He was convicted of all counts but for the assault against the officer.

Cook timely filed a complaint against the officers, under 42 U.S.C. §1983, for false arrest, false imprisonment, malicious prosecution and excessive force. The officers requested summary judgment, and the trial court granted it, under the provisions of Heck v. Humphrey.[60] Cook appealed on the malicious prosecution claim.

ISSUE: Does an acquittal prove that officers lacked probable cause for an arrest?

HOLDING: No

DISCUSSION: The Court noted that a malicious prosecution claim requires proof that the prosecution "was initiated without probable cause." The trial court had reasoned that although Cook was ultimately acquitted on the charge of assaulting the officer, the fact that the grand jury indicted him indicated sufficient probable cause for the charge. Cook contended, however, that the two officers "may have testified untruthfully before the grand jury," which would serve, if true, to be an exception to the usual rule. The Court noted, however, that Cook offered "absolutely no evidence - other than his eventual acquittal on the assault charge - to support that assertion."

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[57] Graham, supra.
[58] 471 U.S. 1 (1985).
[59] The opinion doesn't explain if he allegedly had physical contact with the individual, or if he merely threatened him.
[60] 512 U.S. 477 (1994).

The Court upheld the summary judgment against Cook and in favor of the defendant officers.

INTERROGATION

U.S. v. McConer
530 F.3d 484 (6th Cir. Mich. 2008)

FACTS: On Jan. 19, 2005, Detroit officers executed a search warrant on a duplex. The first officer to enter, Officer Hughes, found Thompson in the living room with his hands raised, and spotted Arone McConer (the appellee), running through the home. He ordered him to stop, but Arone McConer did not. "Hughes followed him into the basement." He stopped Arone and checked him for weapons, and brought him back to first floor. Eventually, he and Thompson both were detained in a second floor apartment. Officer Penn, who followed Hughes into the apartment, found Brian McConer, running through the apartment in another direction and "throw[ing] cocaine packaged in nine Ziploc bags on the floor as he ran." Officer Penn located Brian hiding under a bed and arrested him.

Once the initial sweep was finished, Officer Hamilton arrested Arone and searched him, finding keys to the apartment. In the upper level apartment, he found a quantity of cocaine and marijuana, along with paraphernalia indicating trafficking. A loaded handgun was also found. The officers also found papers, including letters and receipts, containing Arone's name, but none were addressed to him at the residence itself. (The papers contained several other addresses.)

As the items from the search were collected and brought to where Arone could see them, "McConer signaled to Officer Hughes that he wished to speak with him privately." In a bedroom, "[w]ithout any prompting or questioning by Officer Hughes, McConer volunteered that he had just gotten out of prison and that he could not be around guns or dope." Hughes apparently then asked where he lived, and "McConer stated either that he used to live at the residence, or that he does not live there anymore." Hughes told him that they would get the information "all down on paper in a little while" and sent him "back to the living room to relax." The "exchange lasted less than a minute."

> After the search was completed, Officer Hughes interviewed McConer formally in the kitchen. This time, he gave McConer Miranda warnings, and McConer signed a waiver form.
> Hughes then produced a Detroit Police Department interrogation form, which also contained a statement of constitutional rights. Hughes read the rights to McConer again, and McConer signed the second form. McConer then agreed to give a statement. Hughes testified that while he was writing out the questions that he intended to ask McConer, McConer was panicky and kept asking questions, including "how much time could I get for this," and repeated that he "didn't live here anymore, . . . I can't be around any of this stuff, man. You just don't know." Officer Hughes received the following answers to the questions that he had written:
> 1. Do you understand your constitutional rights? "Yes."

2. How long did you live at this location? "For a few months."
3. How much cocaine was in the bedroom? "I don't even know."
4. How long has the pistol been in the bedroom? "I don't know."
5. Why was all of your IDs & paperwork in the front bedroom? "I left all my paperwork & the [toy] motorcycle here when I left."
JA 33. McConer initialed each answer and signed his name at the bottom of the interrogation form.

As they left, McConer indicated his coat to another officer. Unbeknownst to Arone, however, an earlier search of the coat had revealed over $6,000 in cash. Arone was charged with state offenses including trafficking and illegal gun possession. He was encouraged to plead guilty to avoid the case being referred to a federal court, but he decided instead to take the case to a state preliminary hearing. As a result, he was referred for federal prosecution and charges were filed. After a number of procedural matters, Arone requested suppression of the statements he made both to Hughes, and under the formal interrogation a short time later. The trial court denied the request. Arone was eventually convicted in federal court, and appealed.

ISSUE: Does a inadvertent failure to provide a timely Miranda warning, later remedied, invalidate an interrogation?

HOLDING: No

DISCUSSION: The Court quickly concluded the Arone's "unwarned statements" were admissible and did not violate Miranda, because they "were not obtained through interrogation." The only question asked in the bedroom that "could conceivably be construed as 'interrogation'" related to whether Arone lived in the house, and since no contemporaneous record was made of the discussion, even that wasn't clearly as the result of a question, or volunteered and then clarified by the officer. But since the evidence connecting him to the address was already so overwhelming, the Court found that error, if any, was harmless.

With respect to the questioning in the kitchen, the court ruled that "[a]ssuming that Officer Hughes's bedroom question about McConer's living situation was not interrogation, there is no Miranda problem with the admission of the statements" made there. Officer Hughes gave Miranda prior to starting the questioning. Even assuming it was interrogation, though, the Court still found no problem, because it was not analogous to the "question-first" technique condemned in Seibert. The situation was not one in which Miranda was '"inserted in the midst of coordinated and continuing interrogation." It was more similar to that situation in Oregon v. Elstad[61] in which the failure to warn was an unintentional oversight, not a plan. To be inadmissible under Seibert, the "two-step strategy must be 'deliberate' in order to violate Miranda" and that has not been shown to be so in the instant case.

The Court also examined Officer Hughes' testimony that Arone had stated he'd just gotten out of prison, which allegedly violated the court's order not to admit such information. Since they had already stipulated that he was a felon, the Court had ruled that any additional information concerning his criminal past was immaterial. However, even had it had preferred that there had

[61] 470 U.S. 298 (1985).

been "no mention of prison at all," the court did not indicate that it was improper to have a bare mention of his prior prison time nor did it warrant a mistrial.

The Court affirmed Arone McConer's conviction, but remanded his case for sentencing errors.

Jackson v. McKee
525 F.3d 430 (6th Cir. Mich. 2008)

FACTS: On December 11, 2000, the Dollar Value store, in Detroit, Michigan, was robbed by a group of men. The store owner was killed. Jackson became a suspect, and he was asked to come to the police station and provide a statement. He did so, at about 8 a.m. on January 5, 2001.

At 10:30 a.m., Investigator Simon gave Jackson Miranda warnings, which he waived. He denied any involvement in the crime. Jackson was, however, arrested, and again questioned, at about 3 p.m. He was returned to a holding cell. Ross was interviewed the next day, and given a polygraph, and he implicated Jackson in the crime. Once again Jackson was questioned, after again being given Miranda. He was offered a polygraph about 9:55 p.m., and he agreed to take the test. The polygraph session ended shortly after midnight, with Jackson still denying any involvement in the crime. Following further interrogation, however, Jackson changed his story and confessed.

At about 2:15 a.m., Simon returned and again gave Jackson his Miranda warnings, and Jackson signed a written waiver. He confessed to shooting the store owner during the course of a robbery with Ross and another man, Dukes. He also expressed remorse for the crime.

Jackson and the two other men were tried jointly but before two separate juries (Jackson before one, Ross and Dukes before the other). Jackson was convicted, and appealed. After exhausting his state appeals, Jackson requested a habeas petition before the federal court.

ISSUE: What are the factors indicating a confession is voluntary?

HOLDING: See discussion.

DISCUSSION: Jackson first argued that the admission of his confession was improper because it was made involuntarily, through coercion. The Court noted that "[w]hether an interrogation rises to the level of coercion turns on a spectrum of factors: the age, education and intelligence of the suspect; whether the suspect was advised of his Miranda rights; the length of the questioning; and the use of physical punishment or the deprivation of food, sleep or other creature comforts."[62] The Court noted that Jackson appeared of his own accord and waived Miranda no fewer than four times. He expressed remorse when he confessed. He indicated he understood those rights. "He never said he was tired, confused or uncomfortable." He agreed in writing that he was not deprived of "food, water or the use of the restroom." He had prior experience with the criminal justice system. He was not under the influence of drugs or alcohol, or ill, or injured, and he never received any promises or threats. He never asked for an attorney or invoked his right to counsel. As such, the Court found his confession was voluntary.

[62] Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

In addition, the evidence indicated that he waived his rights in a knowing and/or intelligent manner. Despite his claim that he could communicate in a written form, he produced a written confession describing the crime, and further responded in writing to questions from the investigating officer. An expert witness agreed that his waiver was knowing and intelligent. Despite evidence that he had difficulty reading, he had average problem solving skills and intelligence. Even though he presented an expert[63] to the contrary, the trial court's decision was upheld.

Finally, Jackson argued that the admission of testimony from a non-defendant, concerning statements made by Ross and implicating both Ross and Jackson in the homicide, were a violation of his Confrontation Clause rights. Jackson conceded, however, that the statements were "non-testimonial." The Court discussed the evolution of that right, particularly since the ruling in Crawford v. Washington[64] which recognized that non-testimonial hearsay does not implicate the Confrontation Clause. (In other words, the law changed from when the appeals process on the issue began.)

The Court decided that Jackson's claim must fail because current law "does not prevent the admission of non-testimonial hearsay." (The Court also found it was unnecessary to decide the case the other way, because even under prior case law, the judge could decide, based upon certain factors, to admit the hearsay.)

Jackson's conviction was affirmed.

U.S. v. Pacheco-Lopez
531 F.3d 420 (6th Cir. Ky 2008)

FACTS: On March 13, 2006, undercover officers in Louisville made an arrest during a controlled buy of a large quantity of cocaine. They received a search warrant on the address where one of the vehicles involved in the arrest was registered. There, they found Pacheco-Lopez and another man. At the time, the officers knew nothing about those two men.

During a later suppression hearing, the Court noted that the "exact sequence of events" that occurred involving the two men is unclear, "because each of the three officers who testified at the July 10, 2006, suppression hearing recalled the events in a slightly different manner." The Court chose to rely on the testimony of Agent Slaughter (DEA). Trooper Lagrange (KSP) provided language assistance, since Lopez spoke no English. He was given his Miranda warnings in Spanish by Trooper Lagrange. He admitted, upon further questioning, that he had transported the cocaine, and then declined to speak further. (It was later found that the truck that Lopez had admitted driving to Louisville had been modified to transport drugs in a hidden location.") The trial judge ruled that the pre-Miranda questioning was not an interrogation and that it was "only important with the benefit of '20/20 hindsight.'"

Lopez took a conditional guilty plea and appealed.

[63] His own expert indicated he may not have been making a full effort and may have exaggerated his deficiencies.
[64] 541 U.S. 36 (2004).

ISSUE: May a midstream Miranda be provided?

HOLDING: Yes, under appropriate circumstances.

DISCUSSION: Lopez argued that the initial questions did constitute an interrogation. (The prosecution admitted that he was in custody at the time.) The government, however argued that the questions were, in effect, booking questions and thus permitted. The Court noted that "[t]his case requires further delineation of the line between questions relating to the processing of an arrest that are biographical and questions of an investigatory nature." In this case, the Court found that "Lopez's pre-Miranda statements cannot be described as merely biographical, but instead resulted from an interrogation subject to the protections of Miranda. Some of the initial questions would not – in isolation – implicate Miranda; at the very least, asking the defendant his name is the type of biographical question permitted under the booking exception." However, "asking Lopez where he was from, how he had arrived at the house, and when he had arrived are questions 'reasonably likely to elicit an incriminating response,' thus mandating a Miranda warning." The Court made note of the fact that the officers did not "take notes or document [Lopez's] identity at the time." The Court also mentioned that the questioning was not done at a police location, and that undermined the assertion that this questioning was for booking purposes.

The Court found that the booking information was admissible.

Further, the Court noted "[m]idway through the interrogation, the police officers read Lopez his Miranda rights in Spanish."[65] The trial court had permitted the responses that followed this warning, finding that the earlier statements were not interrogation, but because the appellate court found otherwise, it found it necessary to decide "whether Lopez's later, post-Miranda statement should similarly be suppressed or whether it is admissible." Looking to Missouri v. Seibert[66] and Oregon v. Elstad,[67] the Court identified the "relevant factors for determining whether a midstream Miranda warning could be effective are: (1) the completeness and detail involved in the first round of questioning; (2) the overlapping content of the statements made before and after the warning; (3) the timing and setting of the interrogation; (4) the continuity of police personnel during the interrogations; and (5) the degree to which the interrogator's questions treated the second round as continuous with the first." The Court found that an "analysis of the sequence of events surrounding Lopez's interrogation compel [its] conclusion that the warning was ineffective, and that his statements were thus the result of a single, unwarned sequence of questioning." In particular, the sequence of questions was logical, and there was no break in the questioning at all. There was "no break in the questioning or any effort by the police to ensure that Lopez understood that his prior statements could not be used against him."

The Court rules that Lopez's statements both pre- and post-Miranda must be suppressed.

[65] The Court called this "Miranda-in-the-middle."
[66] 542 U.S. 600 (2004).
[67] 470 U.S. 298 (1985).

EVIDENCE/TRIAL PROCEDURE - CRAWFORD

U.S. v. McGee
529 F.3d 691 (6th Cir. Mich. 2008)

FACTS: McGee was indicted on charges of possession with intent to distribute cocaine base. During his trial, one of the officers "testified to statements made by the confidential informant that related to McGee's identity" but "McGee was not afforded the opportunity to confront, or cross-examine, the informant."

Specifically, in an interchange between the prosecutor and the officer:

> Q: Now, what else did you do to confirm that the person your CPI [confidential police informant] was speaking to was Mr. McGee and not Mr. Rimpson?
> A: I called the CPI back the next day and said, Hey, I know we called a few people.
> Who was the one that we finally got that we talked to?
> Mr. Karafa (McGee's attorney): I object, Your Honor. The question's objectionable in the first place, but prior to the answer there's a lack of foundation. It's incompetence [sic] hearsay.
> The Court: No, he's just saying what he did, I think. Overruled. Next question.
> Mr. Lennon (for the government)
> Q: You called the CPI; is that correct?
> A: Right.
> Q: *And confirmed who you were speaking - who he was speaking to that day?*
> A: *Yeah, and he advised Zookie [McGee]*.[68]

Eventually, McGee was convicted, and appealed.

ISSUE: Is a statement by a CI as to the identify of a suspect, by their nickname, potentially testimonial?

HOLDING: Yes

DISCUSSION: The Court noted that

> The confidential informant's statement that he was talking to "Zookie" is testimonial because a reasonable person in the CI's position would anticipate his statements being used against the accused in investigating and prosecuting a crime. The purpose of the informant's statement is also used for the truth of the matter asserted; that is, to identify McGee as the person the CPI talked to on the phone, and with whom he arranged the drug buy. The admission of this evidence therefore violated the confrontation clause.

[68] Emphasis in original.

However, the Court found that since the prosecution introduced sufficient other evidence to support the conviction, that the error was harmless. In particular, the officer had personal contact with McGee in the past and knew him, and his nickname, and that he was the one that showed up at the drug buy.

McGee's conviction was affirmed.

EVIDENCE / TRIAL PROCEDURE - EXPERT WITNESSES

U.S. v. Brown
272 Fed.Appx. 465 (.6th Cir. Ky. 2008)

FACTS: Brown (and five others) were indicted for engaging in drug trafficking in Kenton County, in May, 2006. Brown possessed 6.5 grams of crack cocaine, which he had admitted he had "cooked for sale" - he also had "several small scales." He agreed to become a CI, but after signing the agreement, he "sold drugs for provision to an undercover officer and cooked additional crack … without police permission and contrary to the agreement."

Brown was convicted, and appealed.

ISSUE: May an officer testify as both an expert and a fact witness?

HOLDING: Yes

DISCUSSION: Brown argued that one of the police officers and one of the forensic specialists testified as both a fact witness and as an expert witness. The officer was part of the arrest team, and also testified as to his opinion that the quantity of drug seized "was consistent with distribution, not personal use." The forensic specialist testified as to her procedures with respect to the sample at issue in this case, and well as her opinion on certain matters.

The Court noted that the "qualifications of both witnesses were made a matter of record, and neither testified outside the limits of those qualifications." Even though the Court did not caution the jury as to the dual roles of these witnesses, the Court found that the error, if any, was harmless. The Court did mention, however, that although it might be a "better practice" to provide such an instruction, it was not reversible error to fail to do so.

Brown's conviction was upheld.

EVIDENCE / TRIAL PROCEDURE - INVESTIGATIVE HEARSAY

U.S. v. Pugh
273 Fed.Appx. 449 (6th Cir. Ohio 2008)

FACTS: During Walter and Tyreese Pugh's joint trial for bank robbery, a police detective testified that he "was given the name of Walter Pugh as a possible suspect." In addition, Tyreese argued that one of the witnesses also attributed the statement "we hit a lick" - committed a robbery

- to Walter Pugh. Because Walter did not testify, he could not be cross-examined. The Pughs appealed based upon these statements.

ISSUE: Is background information, albeit hearsay, admissible?

HOLDING: Yes (depending upon circumstances)

DISCUSSION: With respect to the statement by the detective that he received Walter's Pugh's name as a suspect, the Court found that it was not hearsay, as it was not "offered for the truth of the matter asserted (that Walter was guilty) but instead to explain why the detective pursued the investigation in the way that he did." The Court noted that admitting such a potentially testimonial statement "in and of itself is not enough to trigger a violation of the Confrontation Clause" but instead, it must be being introduced as true hearsay - "in other words, it must be offered for the truth of the matter asserted." In this case, it was simply being offered as background information and to explain how the detective conducted his inquiry.

The Court concluded that the statement about "hitting a lick" was non-testimonial, and thus does not implicate the Confrontation Clause - the right to confront witnesses against one. The Court concluded that, under Crawford v. Washington[69], that only testimonial statements implicate the Confrontation Clause, so nontestimonial statements can only be barred by the rules of evidence. Because the witness was not a "police officer or government agent seeking to elicit statements to further prosecutions," but instead, was a friend, there was no anticipation that the statement would be used to investigate or prosecute the crime. Under state hearsay rules, the statement could be used against Walter "as an admission of a party opponent." (The Court provided a limiting instruction explaining to the jury that it could not be used against Tyreese.)

Both convictions were affirmed.

EVIDENCE / TRIAL PROCEDURE - RECORDINGS

U.S. v. Rose
522 F.3d 710 (6th Circ. Mich. 2008)

FACTS: During Rose's trial, the jury was presented with evidence in the form of "audio files on a laptop computer" that were played during an identified informant's testimony. When the jury asked to listen to the recording again, during deliberations, they were brought back into the courtroom to listen to the recording on the laptop. When they requested that they be allowed to take the recordings back into the jury room, the recordings were transferred to CDs and were able to be played on a stereo. (They were never actually physically admitted into evidence during the trial, since at that time, they resided solely on the laptop computer.) The recordings concerned a conversation between the informant and Rose about Rose's sale of a gun, a silencer and a magazine of ammunition. He was eventually convicted of charges relating to the sale, and appealed.

ISSUE: May evidence held on a laptop be copied to a CD, for use in evidence?

[69] 541 U.S. 36 (2004).

HOLDING: Yes (but see discussion)

DISCUSSION: Rose argued that it was inappropriate to change the medium of the recordings and permit them to be taken back into jury room. The Court noted that the "use of CDs was simply a practical solution to the technical challenge of enabling the jury to play the digital recordings."

Further, the Court noted that the "recordings sent into the jury room may be understood to constitute 'original' recordings within the meaning of Rule 1001(3) of the Federal Rules of Evidence or 'duplicate' recordings within the meaning of Rule 1001 (4) of the Federal Rules of Evidence." In both the Federal Rules of Evidence and Kentucky Rules of Evidence, a "duplicate is admissible to the same extent as an original unless a genuine question is raised as to the authenticity of the original or in the circumstances it would be unfair to admit the duplicate in lieu of the original." In this case, prior to being taken back into the jury room, the CDs were played for defense counsel, and defense counsel did not disagree that they were exact copies.

The Court found that it was appropriate to permit the material to be transferred to CD, and further, that it was appropriate to permit the jury to take the CDs into the jury room for additional listening.

After resolving other issues, the Court upheld Rose's conviction.

EVIDENCE / TRIAL PROCEDURE - CONSTRUCTIVE POSSESSION

U.S. v. Gravely
2008 WL 2497696 (6th Cir. Ohio 2008)

FACTS: On Feb. 4, 2006, Officer Gauthney (Columbus PD) was working a extra duty detail at a local hotel. He received a noise complaint at about 1:20 a.m., and found Evans coming out of the room. He told Evans to go back inside and tell his friends to hold down the noise. When Evans opened the door to do so, he saw "several people and drugs in the room" Gravely was sitting on the far bed, next to the night stand, along with five other people sitting variously around the room. Gauthney saw Gravely with a "bag of crack cocaine on his lap." He was also "kicking something on the floor" and further saw him "fidget and appear to reach for something underneath him." He drew his gun, trained it on Gravely and called for backup.

When Officer Sagle arrived, Gauthney approached and handcuffed Gravely. As he stood up, the officer spotted a gun lying on the bedspread. Gravely claimed the gun belonged to someone else, and that he never touched the gun nor did he know if it was loaded. He denied sitting on the gun, but agreed it was next to him. The officers also found a scale and drugs on the nightstand, and drugs were what he had been attempting to conceal.

Gravely was indicted for trafficking and for possession of the gun, as he was a convicted felon. He pled guilty to trafficking and went to a bench trial on the weapons charge, for which the judge further found him guilty. He appealed.

ISSUE: Is an individual sitting in close proximity to a gun, and that is aware of the gun, in constructive possession of the gun?

HOLDING: Yes

DISCUSSION: Gravely argued that he was never in possession of the firearm - either actually or constructively.

> In order to establish unlawful possession of a firearm, the government may show either actual or constructive possession. "Actual possession exists when [the firearm] is in the immediate possession or control of the party."[70] "[T]o establish constructive possession, the government must produce evidence showing ownership, dominion, or control over the contraband itself or the premises or vehicle in which the contraband is concealed."[71]

However, in U.S. v. Arnold, the Court had ruled that "mere proximity to a gun is not enough to establish constructive possession, let alone actual possession."[72] In many case, a "more direct link to the gun is needed." In Gravely's situation, the court argued that he "was sitting in close proximity to the gun, and was aware the gun was there." He was "the only person sitting on the bed, and he was either sitting on top of the gun or right next to the gun." The officer observed "Gravely moving his arms as if he was placing something underneath him." The gun was within his reach.

Gravely's conviction was affirmed.

EVIDENCE / TRIAL PROCEDURE - CHAIN OF CUSTODY

U.S. v. Drake
2008 WL 2224811 (6th Cir. Tenn. 2008)

FACTS: On March 2, 2005, Nashville park rangers spotted Drake at a basketball game, and he "turned and took off running." They pursued him, and Ranger Avant later testified that his hand was cupped and that there "was stuff flying out the back of [Drake's] coat - like feathers or something like that." Ranger Ellington had gone a different rout and approached Drake from a different angle, and "he testified that he saw what he thought was the pistol grip of a gun." He yelled "gun" and both rangers drew their weapons. Drake escaped however. Notably, he was "wearing a dark-colored hat." The rangers continued their search and finally found him, patted him down and found no gun. He denied having a gun, finally admitting to having been carrying a curtain rod.

A third ranger "pointed out [to Avant] a black hat - that appeared to be the same one Drake had been wearing minutes before - next to a shotgun along the fenceline." Both were clean, which the rangers interpreted to mean that they had not been there long.

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[70] U.S. v. Craven, 478 F.2d 1329 (6th Cir. 1973).
[71] Id. (quoting U.S. v. Ferg, 504 F.2d 914 (5th Cir.1974).
[72] 486 F.3d 177 (6th Cir. 2007).

Later investigation indicated that Drake's prints were not on the gun, but an expert stated that was not determinative. The hat was never marked or identified as evidence, and did not appear in a clothing inventory when Drake was arrested. The hat reappeared, however, during Drake's transfer from state to federal custody, when he was recorded as wearing it. The agent who picked him up, "[h]aving been alerted by an Assistant United States Attorney that a black hat relevant to the case was missing," took the hat from Drake. The hat was eventually entered into evidence against him.

Drake was indicted as being a felon in possession, and eventually convicted. He appealed.

ISSUE: Is an item that is not recognized as evidence until some time after the arrest, still admissible, even though the chain of custody is questionable?

HOLDING: Yes

DISCUSSION: Drake argued that the trial court erred in admitting the black hat. Physical evidence, like the hat, "is admissible when the possibilities of misidentification or alteration are 'eliminated, not absolutely, but as a matter of reasonable probability.'"[73] Further, "physical evidence may be admitted even if there is a missing link in the chain of custody, so long as there is sufficient proof that the evidence is what it purports to be and has not been altered in any material aspect.[74] - 'challenges to the chain of custody go to the weight of the evidence, not its admissibility.'"[75]

The Court noted that officers testified as the presence of the hat, and that he could not have gotten the hat from an outside source between the time he was arrested and the time he was transferred. Although there were questions about the chain of custody, the court found that there was no evidence of tampering. As such, the admission was not improper.

Drake's conviction was affirmed.

EVIDENCE / TRIAL PROCEDURE - BRADY

Johnson v. Bell[76]
525 F.3d 466 (6th Cir. Tenn. 2008)

FACTS: On July 5, 1980, an armed robbery took place at a market in Nashville, TN. After securing the cash, the robbery began shooting, and the owner's son was killed. The owner (Bell) and another customer (Smith) were injured. The robber then shot a cab driver and the cab passenger as he fled the scene. The owner was able to give information, however, that led the

[73] U.S. v. Allen, 106 F.3d 695, 700 (6th Cir. 1997) (quoting U.S. v. McFadden, 458 F.2d 440, 441 (6th Cir. 1972)).
[74] U.S. v. Robinson, No. 95-6225, 1996 WL 732297, at *2 (6th Cir. Dec. 19, 1996) (unpublished).
[75] Allen, supra, (quoting U.S. v. Levy, 904 F.2d 1026, 1030 (6th Cir. 1990)).
[76] Note, the Bell in the case citation is not the same person who was the victim in this case, but is, instead, the Warden of the facility where Johnson was being held.

police to arrest Johnson the next day. Both Bell and Smith identified Johnson at trial, as did another customer who entered during the crime.

During the investigation, Davis provided an alibi for Johnson, but he recanted just prior to trial and instead, incriminated Johnson by placing him near the scene of the crime. Johnson was convicted of three counts of murder, and related charges, and was sentenced to death. He then appealed through the state courts, unsuccessfully. Eventually, he appealed to the federal court, under habeas corpus. The case was returned to the Tennessee state courts, but eventually returned to the federal court. The District Court granted the prosecution summary judgment on all issues, and Johnson appealed.

ISSUE: May the failure to disclose records, pursuant to discovery, jeopardize a case?

HOLDING: Yes

DISCUSSION: Johnson argued, first, that the prosecution failed to produce material evidence during his trial, material that he only learned about because of an Open Records request he made some years later. As a result of that request, he "received several police and medical reports" that he argued "undermine[d] the credibility of certain witnesses."

Looking at the evidence under Brady v. Maryland[77], the Court noted that to be successful, Johnson "must show that (1) evidence favorable to the petitioner, (2) was suppressed by the government, and (3) the petitioner suffered prejudice."[78] The Court accepted that the first two elements were satisfied and "proceed[ed] directly to the issue of prejudice or materiality." Johnson argued that the material could have been used to impugn the reliability of the witnesses, particularly Smith, because he could remember little details about the other customers in the store at the time of the robbery. Smith had failed to pick Johnson from a lineup, but the Court noted that even though he was not certain of his identification, he had verbally identified Johnson, "noting that the curled hair differed from that of the robber." (Johnson had apparently curled his hair for the lineup.) Other documents were also in the package, and Johnson objected to having been provided with none of them.

The Court noted, however, that although Smith's memory lacked detail, that "[a]ll of them [the interviews] were taken at a time when Smith could hardly have been expected to describe the events with … clarity" as he was suffering from gunshot wounds to the back and hand. However, given that Smith was admittedly unsure about many of the details of the crime, even at trial, the Court concluded that the "overall impeachment value of these reports, viewed collectively, is fairly minimal."

With respect to the two documents related to the owner, Bell, the Court noted that Bell stated the robber had no facial hair. A photo taken the next day indicated Johnson had a faint mustache and goatee. However, given that Bell knew Johnson as a customer of some long standing, the Court concluded that the documents would have provided little with which to prejudice the case.

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[77] 373 U.S. 83 (1963).
[78] Banks v. Dretke, 540 U.S. 668, 691 (2004).

Finally, the Court addressed a document related to the third witness. However, the Court noted that witness, whose testimony was already weak and contradictory, was unlikely to have been further impeached had Johnson had the documents in question.

The Court found that the failure to disclose the documents, although arguably improper, was insufficient to overturn the conviction. After addressing a number of other allegations, the Court upheld the conviction.

FIRST AMENDMENT

Gilles v. Garland
2008 WL 2468149 (.6th Cir. Ohio 2008)

FACTS: On Oct. 14, 2002, Gilles, a Christian evangelist, considered it a duty to "proclaim his faith to students at colleges and universities throughout the United States and beyond." He was:

> … engaged in fulfilling this duty for about 45 minutes at the "Academic Quad" on the campus of Miami University in Oxford, Ohio when he was interrupted by a campus security officer, Donald Delph." Officer Delph told him he needed permission to "conduct a speech on campus; otherwise he would be arrested." Gilles got a copy of the policy on the matter - which stated:
>
> "Every person with legitimate business at the University has the privilege of free access to the public areas of the buildings and grounds during those hours when they are open, such hours to be determined by the President or designated University official."

When he asked about where he could speak, he was told by Lt. Powers that that "although some areas on campus were designated as free speech areas and some were not, plaintiff's speech was not considered "legitimate business" and would not be permitted anywhere on campus."

Gilles got a lawyer and began correspondence with university counsel. His letter contended "that public grounds on public university campus property represent a "traditional public forum" and that any limitation of expressive activities in these areas is unconstitutional unless "severely restricted." Asserting that religious discussion is protected speech under the First Amendment, the letter demanded rescission of the university policy that classified Gilles's religious speech as not being "legitimate business."

The university general counsel argued that campus property was not a public forum and that Gilles was merely allowed to walk through campus, at best. He could speak if invited by a legitimate university organization, however. Gilles attempted to find a sponsor, unsuccessfully. Eventually, after two years of trying other means to achieve his aim, he filed suit against the university of the campus police, including Lt. Powers.

Following two years of procedural wrangling, the trial court dismissed all of the defendants. Gilles appealed the dismissal of his free speech and due process claims.

ISSUE: Is an unwritten policy enforceable?

HOLDING: Yes (but see discussion)

DISCUSSION: After teasing out the actual claim, the Court focused in on the unwritten policy that Gilles needed a sponsor to speak. Specifically

> He complains that the policy's standards guiding officials' discretion can hardly be found to be sufficiently clear where the policy has not even been reduced to writing. Indeed, the existence of the "speech policy" did not even emerge until over a month after Gilles was denied permission to speak on campus, in Parker's November 27, 2002 letter response to Gilles's attorney. In fact, despite the fact that Gilles sought clarification on October 14 from Officer Delph, from the university administration at the student union, and from Lt. Powers, he was never advised that the reason he lacked permission was that he had failed to obtain an invitation from a student group. These undisputed facts alone support a reasonable inference that the speech policy was not as clear and well-established as defendants now contend.
>
> Even in the Parker letter, which affords the only inkling of the policy's parameters, the "policy and consistent practice" is described simply as not allowing visitors to "make formal speeches and presentations, erect displays, or conduct similar activities unless invited to do so by the University or by a recognized student organization."

The Court noted, however, that there was no information as to whether the "policy has been consistently and uniformly applied. The Court noted that it seriously doubted that the only criteria for speaking on campus was an invitation, asking that "Can it really be that the university has abdicated all responsibility for approving or disapproving on-campus speeches and presentations by visitors?"

The Court noted that it found:

> …no basis for concluding that the student-sponsorship requirement is well-understood. To the extent the pleadings afford any insight into the operation of the unwritten policy, we can conclude only that it was *not* well understood by university officials charged with most immediate responsibility for enforcing it. The allegations of the complaint are devoid of any suggestion that Officer Delph or Lt. Powers even asked Gilles if he had been invited to speak by any student organization. Further, the complaint also affords absolutely no basis for determining that the "consistent practice" has been and is uniformly applied." The Court found that the unwritten policy "appears to be devoid of standards."

The Court then evaluated the claim regarding the nature of the actual forum - whether the campus area in question was a traditional public forum, a limited/designated public forum or a nonpublic forum. The trial court had determined that the area was a limited public forum, and that speech could be restricted if the restriction is content-neutral and reasonable - and further held that the need for student organization sponsorship helped satisfy that restriction. The Court agreed that the space in question in this case was also a limited public forum.

The Court also agreed that the policy seems facially valid, but noted that "further proceedings are warranted to define the contours of the unwritten speech policy and its operation." The case was remanded for such further proceedings. (The Court also deferred Lt. Powers' request for qualified immunity, until the case could be further developed.)

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NOTES

While many of these cases involve multiple issues, only those issues of interest to Kentucky law enforcement officers are reported in these summaries. In addition, a case is only reported under one topical heading, but multiple issues may be referenced in the discussion. Readers are strongly encouraged to share and discuss the case law and statutory changes discussed herein with agency legal counsel, to determine how the issues discussed in these cases may apply to specific cases in which your agency is or may be involved.

Non-published opinions may be included in this update and will be so noted, see below for specific caveats regarding these cases. Cases that are not final at the time of printing are not included. When relevant opinions are finalized, they will be included in future updates. As such, each update may include cases that were decided earlier, but were held for finality.

All quotes not otherwise cited are from the case under discussion. Certain cases, because they appear so often and in cases not specific to their topic matter, do not have their citations included in the footnotes. Their full citations are:

Miranda v. Arizona, 384 U.S. 436 (1966)
Terry v. Ohio, 392 U.S. 1 (1968)

Nost language in italics in the body of the summary is directly from an search warrant affidavit, and all errors are from the original.

NOTES REGARDING UNPUBLISHED CASES

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Unpublished Cases carry a "Fed. Appx." Or Westlaw (WL) citation.

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Unpublished Cases carry the Westlaw (WL) citation.

Kentucky cases that are noted as "Unpublished" carry the following caveat:

Sixth Circuit Rule 28(g) limits citation to specific situations. Please see Rule 28(g) before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.

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Unpublished opinions shall never be cited or used as authority in any other case in any court of this state. See KY ST RCP Rule 76.28(4).